Supreme Court, U.S.
FILED

10-761 SEP 7 - 2010

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

HAROLD E. DOLEY AND DOLEY SECURITIES, INC.,

Petitioners,

V.

WINSTON & STRAWN LLP,

Respondent,

On Petition for Certiorari to the United States Court of Appeals for The District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Benoit Brookens
Claude Roxborough
KIMMEL & ROXBOROUGH, LLP
709 Irving St., NW
Washington, DC 20010
202 /636-1695
Counsel for Petitioner

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The D.C. Bar provides for the mandatory arbitration of fee disputes before a board of trained attorney and non-attorney arbitrators. Arbitration rules expressly allocate the burden of proof of the reasonableness of the fee to the attorney and provide an obligation to advise the client of any development that "renders an earlier estimate substantially inaccurate." Before this court are the following issues:

Whether the court erred in finding that filing a response to a complaint in the form of a motion to dismiss and for a more definite statement was a waiver of the defendant's right to compel a fee dispute arbitration of an attorney under Rule XIII of the District of Columbia Bar Rules and the consumer protections it provides?

Whether or not the court erred in granting a motion for summary judgment where there was an issue of fact as to which fee in a range of fees stated was agreed to by the parties to the agreement.

List of Parties

1. HAROLD DOLEY, Defendant and Petitioner;
2. DOLEY SECURITIES INC. , Defendant and Petitioner; and
3. WINSTON & STRAWN, LLP, Plaintiff and Respondent.

Corporate Disclosure Statement

Doley Securities, LLC, is wholly owned by the Doley Foundation, LLC.

TABLE OF CONTENTS Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

STATEMENT OF THE CASE.....3

A. Facts Giving Rise to This Case.....3

B. The District Court Proceedings.....3

C. The Appellant Court Proceedings.....4

REASONS WHY CERTIORARI SHOULD BE GRANTED.....1

I. Review Is Warranted Because The Opinion Of the District Of Columbia Circuit Conflicts with an Opinion of the Seventh Circuit, As Well As Affirmations Contained In Opinions Of This Court.

II. Review Is Warranted Because The Opinion Of The District Of Columbia Conflicts with This Courts Holding in *AT & T Techs, v.*

Commc'ns Workers, 475 U.S. 643, 650 (1986)

III. Review is warranted because the District Of Columbia Circuit improperly held that the Respondent waived it's right to have its fee dispute arbitrated by filing a motion to dismiss.

IV. Review is warranted because the District Court failed to apply the state law governing lawyers which compels them to submit to mandatory arbitration of fee disputes whenever the clients demands such.

CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES Page

AT & T Techs, v. Commc'ns Workers, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 648 (1986).....6

Bolton v. Bernabei & Katz, PLLC, 954 A.2d 953 (D.C. 2008).....5

Carter v. Cathedral Ave. Coop., Inc., 566 A.2d 716, 717 (D.C. 1989).....6

District of Columbia v. Gray, 452 A.2d 962, 964 (D.C. 1982).....9

Friend v. Friend, 609 A.2d 1137, 1139 (D.C. 1992)...5

Haynes v. Kuder, 591 A.2d 1286, 1289 (D.C. 1991)).....7

Hercules & Co. v. Shama Restaurant, 566 A.2d 31 (D.C. 1989) 4

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 491, (2002) 5

Kahn v. Parsons Global Servs. 521 F. 3d 421 (DC Cir. 2008).....4

Lopata, 735 A.2d at 936..... 5

Masurovsky v. Green, 687 A.2d 198, 202 (D.C. 1996).....6

Schwartz v. Chow, 867 A.2d 230 (D.C. 2005).....5

Steelworker v. Warrior Gulf Nav. Com. 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409, (1960).....5,6

Swann v. Waldman, 465 A.2d 844, 846 (D.C. 1983).....9

STATUTES:

28 U.S.C. 1332

RULES:

Rule 56 of the Federal Rules of Civil Procedure

District of Columbia Bar Rule XIII.....A-108

D.C. Attorney/Client Arbitration Board Rules of Procedures.....A-109

GLOSSARY

ABBREVIATIONS DEFINITIONS

APPENDIX

TABLE OF CONTENTS.....A-1

Decision, U.S. Court of Appeals for DC, June 8, 2010.....A-3

U.S. District Court Order, June 29, 2009.....A-7

USDC Memorandum Opinion
Sept. 17, 2009 .....A-8

Motion of Defendant Harold E. Doley and Doley Securities, Inc. to Reconsider Order Granting Plaintiff's Motion for Summary Judgment.....A-18

Declaration of Harold Doley A-28

Declaration of Allen Counts, Esq. A-33

Answer of Allen Counts to the Interrogatories of the Plaintiff, Winston & Strawn, LLP A-36

Check $10,000.00 .....A-40

Invoice, Winston & Strawn, May 14, 2008.....A-41
Invoice, Winston & Strawn, April 16, 2008.....A-42
Invoice, Winston & Strawn, March 13, 2008.....A-43

Declaration of Chad Robert.....A-44

Declaration of Harold Doley [Second]..... A-46

Letter of Kimmel and Roxborough to Mr. Charles Klein A-48

Corrected Declaration of Thomas M. Buchanan. Esq.....A-54

Defendant's Answer to the Complaint 5/20/2009.....A-61

Plaintiff's Opposition to Defendant's Motion to Reconsider 7/21/09..... A-63

Motion of the Defendants Harold Definite E. Doley and Doley Securities, Inc. to Dismiss the Complaint, or for a More Statement 3/7/08.....A-68

Plaintiff's Opposition to Defendant's Motion to Stay the Proceedings.....A-78

Plaintiff's Opposition to Defendant's Motion to Dismiss, or in the Alternative for a More Definite Statement, 4/22/08.....A-88

Complaint 1/24/08.....A-100

Plaintiff's Errata Statement to the Material Facts to Which There Exist No Genuine Issue for Trial and Buchanan Declaration in Support of It's Motion for Summary Judgment 5/6/08 .....A-106

D.C. Bar Rule XIII.....A-108

Rules of the D.C. Attorney/Client Arbitration Board (ACAB).....A-109

Petition for a Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinion and Judgment Below

The District Court's opinion is reported as 654 F. Supp. 2d 17, (D.D.C. 2009), U.S. Dist. Lexis 84783 (D.D.C., 2009) and reprinted in Appendix, A-7. The court of Appeals unpublished Memorandum Opinion order is unofficially reported at 2010 U.S. App. Lexis 11911 and reprinted in Petitioner's Appendix, A-3.

Statement of Jurisdiction

The District Court has jurisdiction under 28 U.S.C. Art. 1331. The Court of Appeals issued its judgment on June 8, 2010. This Court has jurisdiction under 28 U.S.C. Art. 1254(1).

Statutory and Constitutional Provisions Involved

Relevant provision of American Bar Association requirements is referenced.

28 U.S.C. 1291 provides for de novo judicial review in the U.S. Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the court erred in finding that filing a response to a complaint in the form of a motion to dismiss and for a more definite statement was a waiver of the defendant's right to compel a fee dispute arbitration of an attorney under Rule XIII of the District of Columbia Bar Rules and the consumer protections provided therein?

Whether or not the court erred in granting a motion for summary judgment when there was an issue of fact as to which fee in a range of fees stated was agreed to by the parties to the agreement?

STATEMENT OF THE FACTS OF THE CASE

The appellant entered into an agreement with the appellee to provide legal representation in reference to a subpoena before an administrative agency. The agreement specified a specific fee for the law partner and a range of fees for those who may work on the case. The appellant paid $10,000.00 as a retainer for the legal service.(A-39) Throughout the course of their relationship no accounting was ever made of how the retainer fee was applied. Also, there was no credit given on the bills until after the law suit was filed. Declaration of Harold E. Doley, A-30; Declaration of Allen Counts, Esq. A-33; Invoices of Winston & Strawn, A-41, A-42, and A-43. Three bills were presented by the appellee. Each was disputed and rejected by the appellant. The appellee apologized and explained it was an accounting error. The same bills were presented, each bill failed to reflect an accurate accounting. (Affidavit of Allen Counts, General Counsel for the appellant). A-33 (para 2).

The appellee having never provided a correct bill filed suit in the United States District Court for the District of Columbia. The appellant filed a motion to dismiss and for a more definite statement. A-68 The motion stated that the contract was indefinite as to the range and not a contract. The motion also asked, in the alternative, for a more definite statement. After a hearing on the motion the court ruled, in a light more favorable to the non-moving party, denying the motion. Thereafter, appellant filed a motion to stay the proceeding, pending arbitration before the District of Columbia Bar Attorney Client Arbitration Board. A-78. In a hearing on the motion,

the court ruled that by filing a motion to dismiss and/ or for a more definite statement the appellant waived his right to have arbitration. Citing *Kahn v. Parsons Global Servs.* 521 F. 3d 421 (DC Cir. 2008) and other cases, the court, from the bench, accepted the argument of the appellee.A-7. The court was aware that the facts were different in this case and the *Kahn* case. In *Khan,* a motion for summary judgment, which sought a merits decision, constituted a waiver of the right to arbitrate. The court ignored the argument of the appellant that a motion to dismiss or for a more definite statement did not seek a merits decision which would waive the right to compel arbitration. The court went on to determine that the contract was not ambiguous but definite despite the indefinite range of fees, not specifically agreed upon. The Court also determined that there was no genuine issue of material fact, and as a matter of law, the appellants, were required to pay whatever hourly fee range the appellee chose. A-8. The appellant appealed. A-3.

THE FILING OF A MOTION TO DISMISS AND/ OR FOR A MORE DEFINITE STATEMENT IS NOT A WAIVER OF THE RIGHT TO ARBITRATE THE LEGAL FEE DISPUTE UNDER RULE XIII.

This case is in essence a legal fee collection matter brought against the appellants. In *Hercules & Co. v. Shama Restaurant*, 566 A.2d 31 (D.C. 1989), an order was issued staying that case to allow for arbitration before the District of Columbia Bar Attorney Client Arbitration Board. District of Columbia Bar Rule XIII (A-108) provides that an

attorney who is a member of the District of Columbia Bar "shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client . . . if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court... The arbitration provided under this rule shall be final and binding on the parties according to applicable law." *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953 (D.C. 2008), *Schwartz v. Chow*, 867 A.2d 230 (D.C. 2005).

"Upon a finding of the existence of an enforceable arbitration clause, a presumption in favor of arbitration attaches." *Lopata*, 735 A.2d at 936. This presumption "is essentially a generalized inference of the parties' intent; courts will presume that an arbitration clause agreed upon by the parties was intended to foreclose judicial involvement in their disputes." *Friend v. Friend*, 609 A.2d 1137, 1139 (D.C. 1992). On the other hand, because "arbitration is a matter of contract. . . a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). In navigating the gulf between the judicial presumption in favor of arbitration that derives from the existence of an agreement to arbitrate, and the reluctance to force an unwilling party into unconsented arbitration, the Supreme Court has counseled:

[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

AT & T Techs, v. Commc'ns Workers, 475 U.S. 643,650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers*, 363 U.S. at 582-S3, 80 S.Ct. 1347); *accord Carter v. Cathedral Avc. Coop., Inc.*, 566 A.2d 716, 717 (D.C. 1989). Therefore, the presumption in favor of arbitration arises only when the court has found that the parties have agreed to submit *some* disputes to arbitration. *See AT & T Techs.*, 475 U.S. at 650, 106 S.Ct. 1415. If the arbitration clause can reasonably be interpreted as including the dispute at hand, the presumption — unless rebutted — will lead the court to order it to be resolved through arbitration, and it is precisely in cases where the court must interpret an ambiguous clause that the presumption becomes operative. *See Masurovsky v. Green*, 687 A.2d 198, 202 (D.C. 1996).

On the other hand, if the court has "positive assurance" that the parties did not intend the dispute *sub judice* to be resolved through arbitration, then the court may not compel arbitration, because to do so would be contrary to the parties' agreement. *See AT & T Techs.*, 475 U.S. at 650, 106 S.Ct. 1415; *Steelworkers*, 363 U.S. at 582-83, 80 S.Ct. 1347; *Davis*, 215 U.S.App. D.C. at 122, 667 F.2d at 165 ("Parties to such an agreement cannot be required to

submit to arbitration any matter that they did not agree would be subject to that manner of dispute resolution."). Determining the scope of an agreement to arbitrate, like other issues of contract interpretation, is one that this court undertakes *de novo*. *Masurovsky*, 687 A.2d at 202 (citing *Haynes v. Kuder*, 591 A.2d 1286, 1289 (D.C. 1991)).

The Court of Appeals of the District of Columbia enacted its Rule VIII after the American Bar Association issued its McKay Report in 1992. In effect, the rule was adopted, approved and accepted by all D.C. lawyers, that they agree to submit to arbitration fee disputes with their clients. The appellee is bound by this mandatory arbitration rule. Proffering an interpretation that the appellant waived such right by responding to appellee's complaint with a motion to dismiss and/or for a more definite statement is not a valid argument. It should be noted that when the motion to dismiss or for a more definite statement was denied, the court gave time to the appellant to file its motion to stay the proceeding. A-75. The cases cited by the appellee did not relate to Rule XIII. The lawyers in the District of Columbia agreed and that they are required to arbitrate fee disputes if the client wishes before the Attorney/Client Arbitaration Board (ACAB).

Those rules provide adjudication before both lawyers and non-lawyers (Rule 1)(A-109); coordination with other dispute-resolving agencies (Rule 4); burden of proof regarding the reasonableness of the fees (Rule 19(f)(A-113); and an obligation on the attorney to advise the client of developments in the matter that "renders an earlier estimate substantially inaccurate" (Rule 20(f)(A-117) and the rate charges

by other attorneys in the district of Columbia providing similar legal services (Rule 20 (h)(iii))(A-117) The cases cited by the appellee are distinguished from this proceeding because the appellant never waived its right to arbitrate. Also, the argument that the motion to dismiss and/or for a more definite statement cannot be considered a waiver.

The complaint stated that the appellant refused bills which the client alleges were never prepared properly, failed to reflect payments made and absent mutual assent as to fees for other associates and partners. The motion to dismiss and/or for a definite statement was to clarify what was the cause of action. It was denied because the court is bound to rule on such motions in a light most favorable to the non-moving party. The motion to stay pending Arbitration was the next step. For over a year the appellee never cooperated with the appellant. The appellee refused to send a correct bill. The three bills never reflected the $10,000.00 retainer. Instead the appellee, knowing the credit sensitivity of the appellant, filed suit to damage and intimidate the appellant. Only after the suit (A-95) was filled did the appellee give the appellant credit for the $ 10,000.00, but without showing how it was applied. The appellee could have, at any time, sought to arbitrate this dispute, but did not. The suit itself is in bad faith, oppressive and deceptive. The right to arbitrate was not waived by the motion to dismiss and/or for a more definite statement.

THE COURT ERRED IN GRANTING A MOTION FOR SUMMARY JUDGEMENT.

Under Rule 56 of the Federal Rules of Civil Procedure, a summary judgment motion may be granted only upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court must examine the verified complaint, answers to interrogatories, depositions and affidavits, to determine whether there were any genuine issues of material fact.A-25, A-29, A-41. *District of Columbia v. Gray*, 452 A.2d 962, 964 (D.C. 1982). "We construe these materials in the light most favorable to the non-moving party, resolving in that party's favor any doubt as to the existence of a factual dispute". *Swann v. Waldman*, 465 A.2d 844, 846 (D.C. 1983).

THERE IS A MATERIAL ISSUE OF FACT THAT NEEDS TO BE DETERMINED.

This case arises from allegations made by the Law firm of Winston & Strawn, LLP, that the defendants owe plaintiff $84,412.19 for legal assistance for one deposition taken by the Office of Thrift Supervision on July 18, 2007. The plaintiff suggests that a document signed on April 19, 2007 was a contract which the defendants breached. The contracts was indefinite as to the specific hourly rates that would be charged by firm attorneys and legal assistants. Rather, it specified a broad range of possible fees to be charged. The affidavit of Harold

Doley stated that he and Mr. Buchanan agreed that he was required to pay the lowest fee in the range set forth therein in the contract. The affidavit (A-29) clarifies that the appellee did not have discretion to pick which fees in the range to be charged.

Mr. Buchanan states in his affidavit (A-56, para. 8; and corrected Affidavit A-106) that prior to the contract he and Mr. Doley agreed to Mr. Mancusi's fee rate of $480 per hour. He states "That Doley told Buchanan and Mancusi that he understood and accepted the fees and cost that were associated with W&S's Legal Work." Mr. Doley states that he agreed to pay only the lowest range of fees listed in the contract. The fact that after the preliminary discussion the range of fees were listed rather than a stated fee for Mr. Mancusi, verifies Mr. Doley's position. This is a material issue of fact which must be determined by a fact finder. The difference between the lower fees and the fees arbitrarily set by the appellee and charged to the appellant is substantial. Parol evidence would have been admissible to prove the disputed issues of fact. The D.C. Attorney Client Arbitration Board (ACAB) places the burden of proof clearly on the attorney (Rule 19(f)(A-113) not the client—as ruled by the District Court. The attorney, before the ACAB, has to demonstrate informing the client of any "development occurring during the representation that renders an earlier estimate substantially inaccurate" (Rule 20(f)(A-117). The ACAB has expert knowledge of the customary hours expended and fees charged for similar one day administrative proceedings and has primary jurisdiction (compare Far East Conference v. United States, 342 U.S. 570

(1952) to determine the "reasonableness" of the charges in the District of Columbia (Rule 20(h)) and approved by D.C. Judges for attorneys practicing in the District of Columbia.

THE DEFENDANT'S BILL NEVER REFLECTED A CREDIT FOR THE $ 10,000 BEFORE THE SUIT WAS FILED.

The attorney for plaintiff stated that plaintiff gave the defendant a credit for the $10,000 payment before the suit was filed. No such credit was given. All the bills fail to reflect the payment of the $10,000. (see affidavit of Alan Counts Board Chairman of Defendant's Corporation). A-34. Also according to the affidavit of Alan Counts the bills were never acknowledged as the correct bills. Essentially no correct bill was ever presented. A trial of the question of whether or not a correct bill was ever presented is necessary to arrive at the true value of the service offered. There has never been a discussion by the parties of a correct and proper bill.

In consideration of the affidavit of Mr. Buchanan (A-54) and Mr. Doley, (A-28) a trial should have been set. The question to be determined is whether or not Mr. Doley agreed to pay whatever fee set within the range offered in the contract by Mr. Buchanan or to pay only the lowest fee set in the range. The other question to be determined is whether or not a correct bill was ever sent, acknowledged by the appellant to be correct.

The court erred by not following District of Columbia Bar Rule XIII which requires mandatory arbitration

by an attorney who is a member of the District of Columbia Bar.

In conclusion the Court made an error in not allowing the appellant his right to have the legal fee dispute arbitrated by the panel of experts so designated by the D.C. Bar for such disputes. The ACAB allocates the burden of proof to the attorney (ACAB, Rule 19(f)) and requires notice of developments (ACAB, Rule 20 (f)) that in effect increased ten–fold--the estimate relative to the value of the retainer.

We ask this Court to remand the case to the District Court with the instruction that the fee dispute be arbitrated at the request of the client. To do otherwise would undo the work of the American Bar Association and its effort to have better relations with clients.

For these reasons, this Court is requested to grant certiorari for this petition.

Respectfully submitted,

Benoit Brookens
Claude Roxborough
KIMMEL & ROXBOROUGH, LLP
709 Irving St. NW
Washington, DC 20010
202/636-1695
Counsel for Petitioner

Supreme Court, U.S.
FILED

10-761 SEP 7 - 2010

OFFICE OF THE CLERK

APPENDIX
No. ____

IN THE
SUPREME COURT OF THE UNITED
STATES

HAROLD E. DOLEY AND DOLEY
SECURITIES, INC.,

Petitioners,

V.

WINSTON & STRAWN LLP,

Respondent,

PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS.....A-1

Decision, U.S. Court of Appeals
for DC, June 8, 2010.... .....A-3

U.S. District Court Order, June 29,
2009.....A-7

USDC Memorandum Opinion
Sept. 17, 2009 .....A-8

Motion of Defendant Harold E. Doley and Doley
Securities, Inc. to Reconsider Order Granting
Plaintiff's Motion for Summary
Judgment.....A-18

Declaration of Harold Doley A-28

Declaration of Allen Counts, Esq. A-33

Answer of Allen Counts to the Interrogatories of the
Plaintiff, Winston & Strawn, LLP A-36

Check $10,000.00 .....A-40

Invoice, Winston & Strawn, May 14, 2008.....A-41
Invoice, Winston & Strawn, April 16, 2008.....A-42
Invoice, Winston & Strawn, March 13, 2008.....A-43

Declaration of Chad Robert.....A-44

Declaration of Harold Doley
[Second]..... A-46

Letter of Kimmel and Roxborough to
Mr. Charles Klein A-48

Corrected Declaration of Thomas
M. Buchanan. Esq.....A-54

Defendant's Answer to the Complaint.....A-61
5/20/2009

Plaintiff's Opposition to Defendant's Motion to
Reconsider 7/21/09.....A-63

Motion of the Defendants Harold E. Doley and Doley
Securities, Inc. to Dismiss the Complaint, or for a
More Definite Statement 3/7/08.....A-68

Plaintiff's Opposition to Defendant's Motion to
Stay the Proceedings.....A-78

Plaintiff's Opposition to Defendant's Motion to
Dismiss, or in the Alternative for a More Definite
Statement, 4/22/08.....A-88

Complaint 1/24/08.....A-100

Plaintiff's Errata Statement to the Material Facts to
Which There Exist No Genuine Issue for Trial and
Buchanan Declaration in Support of It's Motion for
Summary Judgment 5/6/08 .....A-106

D.C. Bar Rule XIII.....A-108

D.C. Attorney/Client Arbitration Board (ACAB)
Rules of Procedure.....A-109

United States Court of Appeals

For the District of Columbia

2010 U.S. App. LEXIS 11911,*

Winston & Strawn, LLP, Appellee v. Harold E. Doley and Doley Securities, Inc., Appellants

No. 09-7118

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2010 U.S. App. LEXIS 11911

June 8, 2010, Filed

NOTICE:
PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the District of Columbia. (No. 1:08-cv-00144-RBW). *Winston & Strawn, LLP v. Doley, 654 F. Supp. 2d 17, 2009 U.S. Dist. LEXIS 84783 (D.D.C., 2009)*

COUNSEL: For Winston & Strawn, LLP, Plaintiff – Appellee: *Thomas Matthew Buchanan, Charles Bennett Klein*, Winston & Strawn LLP, Washington, DC.

For Harold E. Doley, Doley Securities, Inc., Defendants - Appellants: *Claude William Roxborough*, Law Office of Claude W. Roxborough, Washington, DC.

JUDGES: Before: SENTELLE, Chief Judge, and BROWN and KAVANAUGH, Circuit Judges.

OPINION

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. RULE 34(j). The court has accorded the issues full consideration and has determined they do not warrant a published opinion. *See* D.C. CIR. RULE 36(d). It is

ORDERED AND ADJUDGED that the district court's September 17, 2009 order denying the motion for reconsideration of its summary judgment ruling be affirmed. As the district court found, the unpaid bills on which Winston & Strawn sue clearly show the application of the $ 10,000 retainer fee to the amount owed. As to appellants' second assignment of error, the representation agreement between the [*2] parties specifies that the lawyers who performed work for appellants may be billed for within a range of possible fees. Appellants' presentment of a prior oral agreement that they would only be charged fees

at the low end of those ranges is inconsistent with the written representation agreement and is barred by the parol evidence rule. *See District Realty Title Ins. Corp. v. Ensmann, 767 F.2d 1018, 1022, 247 U.S. App. D.C. 228 (D.C. Cir. 1985).*

Appellants' last argument to us is that the district court erred in not staying the litigation proceedings to allow arbitration to go forward. This argument fails under the rule established in *Khan v. Parsons Global Services, Ltd., 521 F.3d 421, 380 U.S. App. D.C. 320 (D.C. Cir. 2008).* There, we held that a party is deemed to have waived his right to compel arbitration if he actively participated in the lawsuit. At the time appellants filed their motion to stay proceedings, they had already filed a motion, stylized under *Fed. R. Civ. P. 12(b)(6),* but which was supplemented with materials outside the pleadings. When this occurs, "the motion must be treated as one for summary judgment under Rule 56." FED. R. CIV. P. 12(d). Because appellants had already actively participated in the lawsuit, [*3] the district court did not err in holding that they had waived their right to compel arbitration.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P.

41(b); D.C. CIR. RULE 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN, LLP,
Plaintiff,
v. Civil Action No. 08-144 (RBW)

HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,
Defendants.

ORDER

In accordance with the oral ruling of the Court issued at the conclusion of the hearing on the merits of the plaintiff's motion for summary judgment held on June 26, 2009, it is

ORDERED that the plaintiff's motion is GRANTED. It is further

ORDERED that FINAL JUDGMENT is entered in favor of the plaintiff against the defendants jointly and severally in the amount of $ 84,412.19, plus prejudgment interest and costs. It is further

ORDERED that this case is CLOSED.

SO ORDERED this 29th day of June, 2009.

REGGIE B. WALTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN, LLP,

Plaintiff,

v. Civil Action No. 08-144 (RBW)

HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,

Defendants.
)

MEMORANDUM OPINION

Winston & Strawn, LLP, the plaintiff in this civil lawsuit, seeks $84,412.19 in damages from Harold E. Doley and Doley Securities, Inc., Complaint at 1, for alleged breach of contract in the form of non-payment of legal fees allegedly owed to the plaintiff, id. ¶¶ 6–18. On June 26, 2009, the Court held at the conclusion of a hearing on the merits of a motion for summary judgment filed by the plaintiff that summary judgment in favor of the plaintiff was appropriate. The Court issued an order to that effect on June 29, 2009. Currently before the Court is the defendants' motion for reconsideration of the Court's oral ruling and subsequent order granting summary judgment in favor of the plaintiff pursuant to Federal Rule of Civil Procedure 59(e). Motion of the Defendant[s] Harold E. Doley and Doley Securities, Inc. to Reconsider Order

Granting Plaintiff's Motion for Summary Judgment (the "Defs.' Mot.") at 1. After carefully considering the defendants' motion and all memoranda of law and exhibits concerning that motion,(Footnote 1) the Court concludes that it must deny the defendants' motion for the reasons that follow.

"As this Court has noted in the past, motions for reconsideration under Rule 59(e) are disfavored and should be granted only under extraordinary circumstances." *N.Y.C. Apparel F.Z.E. v. U.S. Customs and Border Protection Bureau*, 618 F. Supp. 2d 75, 76 (D.D.C. 2009) (Walton, J.) (internal citation and quotation marks omitted). Indeed, a motion of this sort "need not be granted unless the [Court] finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006) (internal citation and quotation marks omitted). The plaintiff does not contend that there has been a "change of controlling law" since the Court denied its motion for attorney's fees, that there is any "new evidence" that merits the Court's attention, or that some form of "manifest injustice" will result from the Court's order. Thus, the only possible basis for reconsideration of the Court's order granting summary judgment in favor of the plaintiff would be a "clear error" in the legal reasoning leading to the entry of the order.

The defendants argue that the Court clearly erred in granting summary judgment in favor

of the plaintiff because (1) there is a genuine issue of material fact as to whether the defendants agreed to the range of rates set forth in the engagement letter provided by the plaintiff and signed by the defendants, Defs.' Mot. at 1- 2; Defs.' Mem. at 6–7, (2) the plaintiff failed to deduct $10,000 from its final bill to reflect the retainer paid by the defendants, Defs.' Mot. at 2, and (3)

[Footnote1 - In addition to the plaintiff's complaint as well as all documents relating to its motion for summary judgment, the Court considered the following documents in reaching this decision: (1) the Memorandum of Points and Authorities in Support of the Motion of the Defendant[s] Harold E. Doley and Doley Securities, Inc. to Reconsider Its Order for Summary Judgment (the "Defs.' Mem.") and (2) the Plaintiff's Opposition to Defendants' Motion to Reconsider (the "Pl.'s Opp'n"). The plaintiff has also filed a separate motion to compel responses to post-judgment interrogatories and requests for production served on the defendants, which the Court will address separately.] End of footnote. [Page 2]

[Page 3 begins] this case should have been referred to the District of Columbia Bar for mandatory arbitration notwithstanding the Court's prior determination that such a defense had been waived by the defendants, id. at 3. The plaintiff contests each of these assertions. See Pl.'s Opp'n at 2–3 (arguing that Doley's sworn statement in a declaration that the plaintiff agreed to restrict its

rates to the lower end of the range for each category of employees constitutes inadmissible parol evidence in light of the executed engagement letter); id. at 3 (contending that "the $10,000 retainer was applied to [the d]efendants' bills and subtracted from the total that [the d]efendants owe"); id. at 3–4 (asserting that the defendants' arguments concerning mandatory arbitration are untimely).

Each of the issues raised by the defendants in their motion for reconsideration has already been addressed by this Court. At the hearing on the plaintiff's motion for summary judgment held on June 26, the Court explained that Harold Doley's subjective understanding that the plaintiff would limit its fees to the lower end ranges stated in its engagement letter was irrelevant in light of the fact that the ranges are clearly set forth without restrictions in the engagement letter itself. See *Giotis v. Lampkin*, 145 A2d. 779, 781 (D.C. 1958) ("[W]hen the parties to a contract have reduced their entire agreement to writing, the court will disregard and treat as legally inoperative parol evidence of [prior negotiations and oral agreements."). The Court also rejected the defendants' arguments regarding the plaintiff's alleged failure to credit their retainer based upon the plaintiff's uncontroverted evidence, which reflected a $10,000 deduction in the plaintiff's legal fees due to the retainer. See Plaintiff's Statement of Material Facts As to Which There Exists No Genuine Issue for Trial, Ex. A (Declaration of Thomas M. Buchanan, Esq.), at Attachment 4 (Statement of Account dated Jan. 16, 2008) (reflecting the

[Page 4 begins]

application of a $10,000 credit to the amount of legal fees incurred by the plaintiff delineated in the invoice dated June 28, 2007).

The defendants' arguments regarding the need for arbitration have also been presented to the Court before in the context of a motion filed by the defendants to stay this case pending arbitration before the District of Columbia bar. See Motion to Stay Proceedings to Allow Arbitration of Fee Dispute Before the Attorney[-]Client Arbitration Board As Well As Defendant[s'] Prosecution of Other Grievances at 1–2 (making this argument). The argument arises from Rule XIII(a) of the Rules Governing the District of Columbia Bar, which provides in pertinent part:

> An attorney subject to the disciplinary jurisdiction of [the District of Columbia Court of Appeals] shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the attorney were engaged, or if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court or a District of Columbia government agency.

The Court has never questioned the legitimacy of this rule, which has been recognized as a valid basis to demand arbitration by the District of Columbia Court of Appeals. See *Schwartz v. Chow*, 867 A. 2d 230, 232 n.7 (D.C. 2005) (recognizing the validity and applicability of the rule). However, as the Court explained in rejecting the defendants' request for a stay based upon this rule, "[t]he right to arbitrate, like any contract right, can be waived." *Nat'l Found, for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F. 2d 772, 774 (D.C. cir. 1987), including "by acting inconsistently with the arbitration right," *Khan v. Parsons Global servs., Ltd.*, 521 F. 3d 421, 425 (D.C. Cir 2008) (internal citation and quotation marks omitted). "One example of [Page 5 begins] such conduct is active participation in a lawsuit." Id. (internal citation and quotation marks omitted).

Although it recognized some differences between the facts in *Khan* and the situation presented in this case, the Court held at the hearing on the defendants' motion to stay, and concludes again today, that *Khan* controls the disposition of the defendants' arbitration request. In that case, the plaintiffs, Azhar Ali Khan and Asma Azhar Khan, filed suit against Azhar Ali Khan's former employer and its agents (collectively "Parsons") for negligence and intentional infliction of emotional distress in the District of Columbia Superior Court. *Id.* at 423-24. Parsons removed the case to this Court and filed a motion to dismiss or for summary judgment or to compel arbitration. *Id.* at 424. Another member of this Court granted summary judgment in favor of Parsons, but the District of Columbia Circuit

reversed that decision. Id. On remand, Parsons filed a motion to compel arbitration, which was eventually granted by the member of this Court assigned to the case. *Id.* The Khans appealed this ruling as well, arguing that Parsons had waived its right to arbitration under its employment agreement with *Azhar Ali Khan. Id.* at 424-25.

Once again, the District of Columbia Circuit reversed this Court's ruling, finding "no ambiguity concerning Parsons' involvement in litigation on the merits." Id. at 426. In reaching this decision, the court explicitly rejected the argument advanced by Parsons that it had not waived its right to arbitration because "it did not move for discovery, nor file an answer asserting affirmative defenses." *Id.* The court reasoned that Parsons' request for summary judgment was inconsistent with the pursuit of any arbitration remedy because "[a] summary judgment motion by definition 'goes to the merits of the case.'" Id. (quoting 10A Charles A. Wright, Arthur R. Miller & mary K. Kane, Federal Practice and Procedure, Section 2712 (3d ed. 2007)). Moreover, the [Page 6 begins] circuit court "[did] not find probative Parsons' characterization of its motion as one for dismissal of the complaint, or, in the alternative, for summary judgment" because, form its perspective, "where...a party moves for summary judgment through a motion including or referring to 'matters outside the pleading,'...that party has made a decision to take advantage of the judicial system and should not be able thereafter to seek compelled arbitration." Id. at 427 (quoting Fed. R. Civ. P. 12(d)). As the court explained, "[a] less rigorous approach to summary judgment based on materials outside the

pleadings would encourage parties to attempt repeat litigation on merits issues not resolved to their satisfaction, undermining the policy that arbitration may not be used as a strategy to manipulate the legal process." Id. (internal citation and quotation marks omitted).

At first blush, *Khan* would appear to be inapplicable to this case because the defendants in this case, unlike the defendants in *Khan*, never requested summary judgment. However, the basis for the defendants' motion (at least insofar as the defendants requested dismissal of the plaintiff's complaint) was not some defect in the plaintiff's' pleadings, but rather that the engagement letter signed by the defendant and the plaintiff was a void for vagueness. Memorandum of Points and Authorities in Support of the Motion of the Defendant[s] Harold E. Doley and Doley Securities, Inc. to Dismiss the Complaint[] or [,] in the Alternative, for a More Definite Statement at 5-6. Indeed, the defendants referred to numerous facts outside the plaintiff's complaint in their reply memorandum in support of their motion to dismiss or for a more definite statement, even going so far as to attach exhibits in support of their reply. See generally Supplemental Memorandum to the Defendant's Motion to Dismiss or for a More Definite Statement.

[Page 7 begins] In requesting dismissal of the plaintiff's complaint based on the merits of the plaintiff's breach of contract claim (as opposed to a determination of the sufficiency of the plaintiff's allegations), the defendants "made a decision to take

advantage of the judicial system," just like the defendant in *Khan*. *Khan*, 521 F. 3d at 427. Compelling arbitration under such circumstances would have given rise to the same problem identified by the court in *Khan*: namely, allowing the party seeking arbitration to "indulg[e] in a second bite at the very questions presented to the court for disposition." Id. (internal citation and quotation marks omitted). Thus, the Court correctly followed Khan by denying the defendants' motion to stay because the defendants through their course of conduct in this case, waived any right to arbitration accorded to them by Rule XIII of the Rules Governing the District of Columbia Bar.

"[A] Rule 59(e) motion is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier." *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 421 (D.D.C. 2005) (internal citation and quotation marks omitted). The defendants' motion for reconsideration is replete with such arguments, none of which are any more persuasive than they were when the Court rejected them the first time around. Accordingly, the Court will deny the defendants' motion for reconsideration under Rule 59(e).

SO ORDERED

17th day of September, 2009. (2)

REGGIE B. WALTON
United States District Judge

[Footnote 2. An order will be entered contemporaneously with this memorandum opinion denying the defendants' motion for reconsideration. Page [7]]

UNITED STATES DISTRICT COURT
District of Columbia
WINSTON & STRAWN, LLP,
Plaintiff,
Vs. Case: 1:08-CV 00144
HAROLD F. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

Assigned to: Walton, Reggie B
Assign Date: 1/24/2006
Description: Contract

MOTION OF THE DEFENDANT'S HAROLD E. DOLEY AND DOLEY SECURITIES, INC. TO RECONSIDER ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants Harold E. Doley and Doley Securities Inc., by and through their undersigned counsel and pursuant to Federal Rules of Civil Procedure 59 (a) and 60(b), respectfully request that this Court open the judgment to consider new testimony by declaration of Harold Doley and reconsider its findings that there are no genuine issues of material facts. Upon which such reconsideration set a trial on the issue of whether or not the parties, prior to the signing of the contract agreed that the defendant was to pay only the lowest rate in the range of fees stated.

THERE IS A MATERIAL ISSUE OF FACT THAT NEEDS TO BE DETERMINED.

This case arises from allegations made by the Law firm of Winston & Strawn, LLP. that the defendants owe plaintiff $ 84,412.19 for legal assistance in one deposition taken by the Office of Thrift Supervision on July 18, 2007. The plaintiff suggests that a document signed on April 19, 2007 was a contract which the defendants breached. The contract was indefinite as to the specific hourly rates that would be charged by firm attorneys, legal assistant. Rather it specified a broad range of possible fees to be charged...The affidavit of Harold Doley stated that he and Mr. Buchanan agreed that he was required to pay the lowest fee in the range set forth therein in the contract. The affidavit clarifies that the Plaintiff did not have discretion to pick which fees in the range, to be charged.

Mr. Buchanan states in his affidavit that prior to the contract he and Mr. Doley agreed to Mr. Mancusi's fee rate of $ 480 stating, "That, Doley told Buchanan and Mancusi that he understood and accepted the fees and cost that were associated with W&S's Legal Work." Mr. Doley states that he agreed to pay only the lowest range of fees listed in the contract. The fact that after the preliminary discussion the range of fees were listed rather than a stated fee for Mr. Mancusi, verifies Mr. Doley's position. This is a material issue of fact which must be determined by a fact finder. The difference between the lower fees and the fees arbitrarily set by the plaintiff and charged to the defendant is substantial.

THE DEFENDANTS BILL NEVER REFLECTED A CREDIT FOR THE $ 10,000 BEFORE THE SUIT WAS FILED.

The attorney for plaintiff stated that plaintiff gave the defendant a credit for the $ 10,000 payment before the suit was filed. No such credit was given. All the bills fail to reflect the payment of the $ 10,000. payment (see affidavit of Alan Counts Board Chairman of Defendant's Corporation). Also according to the affidavit of Alan Counts the bills were never acknowledged as the correct bills. Essentially no correct bill was ever presented. A trial of the question of whether or not a correct bill was ever presented is necessary to arrive at the true value of the service offered. There has never been a discussion by the parties of a correct and proper bill.

THE ENTIRE QUESTION SHOULD HAVE BEEN SUBJECT TO MANDATORY ARBITRATION BY THE DISTRICT OF COLUMBIA BAR.

Although, the Court gave credence to the cited case, the motion for arbitration through the District of Columbia Bar should have been granted. The court relied on the case cited which gave great weight to the fact that in our motion to dismiss we stated it should be with prejudice. This case was not in the procedural posture of the other cited cases which denied arbitration. No answer had been filed and the response under rule 12 was appropriate but not of such posture as to cut off the right of the client to have mandatory arbitration.

Wherefore, upon the premises considered the defendants pray that the court reconsider its order granting Summary Judgment and set this matter for trial of the question of whether of not Mr. Doley agreed to pay whatever fee set within the range offered in the contract by Mr. Buchanan or to pay only the lowest fee set in the range. The other question to be determined is whether or not a correct bill was ever sent acknowledged by the plaintiff as corrected.

Respectfully Submitted
__/Claude ROXBOROUGH
Claude Roxborough Esq. 162313
709 Irving St., NW
Washington, DC 20010
202 270 6109

CERTIFICATE OF SERVICE

I Claude Roxborough Esq. hereby certify that a copy of the foregoing was mailed postage prepaid to Thomas Buchanan 1700 K Street, NW, Washington, DC 20006 this day of 2008.
__/s/Claude Roxborough_____
Claude Roxborough

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,
Plaintiff,

Vs. Case: 1:08-CV 00144

HAROLD F. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

Assigned to: Walton, Reggie B
Assign Date: 1/24/2006
Description: Contract

MEMORANDUM OF POINTS ANDAUTHORITIES IN SUPPORT OF THE MOTION OF THE DEFENDANT'S HAROLD E. DOLEY AND DOLEY SECURITIES, INC. TO RECONSIDER ITS ORDER FOR SUMMARY JUDGMENT.

TABLE OF CONTENTS

I. Introduction 3
II. Factual Background 3
III. Argument 4
IV. Conclusion5

I. INTRODUCTION

Defendant's Harold E. Doley and Doley Securities, INC. ("Doley") hereby respectfully moves this Court to reconsider its order for Summary Judgment and set this matter down for trial of the question of whether or not

Mr. Doley agreed to pay whatever fee set within the range offered in the contract by Mr. Buchanan or to pay only the lowest fee set in the range. The other question to be determined is whether or not a correct bill was ever sent acknowledged by the plaintiff as corrected.

II. FACTUAL BACKGROUND

Defendant's Harold E. Doley and Doley Securities, Inc... ("Doley") sought legal advice regarding a subpoena for a deposition to be conducted by the Office of The Thrift Supervision. They were not targets of the investigation or parties to any lawsuit related to Independence Federal Savings and Loan Inc. The defendants paid $ 10,000.00 for legal assistance in the preparation for their deposition. An agreement was tendered by the plaintiff Winston & Strawn LLP., to provide representation in the investigation which stated a specific amount for Mr. Buchanan but stated a range for the other partners, associates and legal assistants to be used. Throughout the very limited representation of the Defendants by the Plaintiff, fees for partners, associates and legal assistance were never defined. Rather, it was understood by Mr. Doley that he was only to have paid the lowest fee in the range. A number of bills were sent which were incorrect and objected to by the defendant. No corrected bill was ever sent which were consistent with the agreement. The plaintiff was not given discretion to set the fee. Rather the range was set out to display what the lowest fee for each category that the defendant agreed to pay. The

plaintiff provided assistance for only one deposition. After which their services were no longer needed.

III. ARGUMENT

Standard for Reconsideration, a Motion for Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure a summary judgment may be granted only upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law. *Maddox v. Bano*, 422 A.2d 763 (D.C. 1980); *Willis v. Cheek*, 387 A.2d 716 (D.C. 1978); Super. Ct. Civ. P. 56. On appeal, this court must view the record in the light most favorable to the non-movant, and any doubt as to the existence of a factual dispute must be resolved against the movant. *Yasuna v. Miller*, 399 A.2d 68 (D.C. 1979); *Turner v. American Motors General Corp.*, 392 A.2d 1005 (D.C. 1978).

In this case there are several genuine issues of material fact precluding summary judgment for either party. They are: 1.whether of not Mr. Doley agreed to pay whatever fee set within the range offered in the contract by Mr. Buchanan or to pay only the lowest fee set in the range. 2. whether or not a correct bill was ever sent acknowledged by the plaintiff as corrected and properly reflecting credits, fees and rates.

The Plaintiff states in the Complaint the following: "This matter is a simple breach of contract case that cannot be more clear. Defendants agreed by written contract for W&S to represent them in a legal matter, and in exchange, to payW&S for its legal services. The fees and cost of W&S's legal services were explained to Defendants both orally and in the written agreement. W&S performed legal services on behalf of Defendants at the rates that were spelled out in the written agreement, and without complaint from Defendants. As a result of the work performed by W&S on behalf of Defendants, Defendants owe W&S $ 84,412.19, which Defendants have not paid, and thus defendants have breached a written contract with W&S."

The alleged contract referred to by the Plaintiff is clear as to Mr. Buchanan but as to others it reflected a range of rates to which the plaintiff only agreed to pay the lowest rate. The affidavit of Mr. Buchanan states that he and Mr. Doley agreed to a $480.00 rate for Mr. Mancusi although, he did not put it into the contract. The contract expressed a range consistent with Mr. Doley's declaration that he only agreed to pay the lowest range and signed upon it being so reflected in the contract. Coupled with the confusion about the bills as to their correctness, a trial is required of these significant questions and conflicting testimonies. See Exhibits

THE ENGAGEMENT LETTER IS OUT OF LINE WITH TO THE PLAINTIFF'S OWN GUIDELINES

...The plaintiff submitted as his exhibit 1 to the Complaint a statement by Ms. Ann Massie Nelson who in an article stated among other things the following regarding engagement letters for clients: DETAIL THE PAYMENT FOR SERVICES AND THE TIMING FOR PAYMENT.

As all lawyers know, issues over billing and payment are frequently the flash point for lawyer client disputes. Include the hourly fee for each attorney and paralegal, how any contingency fee will be calculated, and what expenses will be charged, the more details provided in the engagement letter, the less wiggle room for disputes to arise. Retainers may deserve special attention because they're often confusing to clients. Are they applied to the first bill or to the last? These matters need to be spelled out. (Exhibit 1 of the plaintiff's complaint article entitled ABA General Practice Solo & Small Firm Division Volume 19, number 7)

The contract / engagement letter was not clear as to the spelling out of the fees for each attorney. Mr. Doley was clear that, he could only pay the lowest fee in the range of fees. Mr. Buchanan in his contradictory declarations believed he had Mr. Doley agree to pay Mr. Mancusi $ 480 per hour before the contract was signed. Who is to be believed? This question must be decided by a fact finder, because the contract is not clear.

IV. CONCLUSION

For all of the foregoing reasons, the Defendants respectfully request that this court reconsider it order for Summary Judgment and set a trial of the question of whether of not Mr. Doley agreed to pay whatever fee set within the range offered in the contract by Mr. Buchanan or to pay only the lowest fee set in the range. The other question to be determined is whether or not a correct bill was ever sent acknowledged by the plaintiff as corrected.

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP.
Plaintiff,

Vs. Case 1:08-CV- 00144

HAROLD F. DOLEY. and
DOLEY SECURITIES, INC..
Defendants.

Assigned to: Walton
Assign Date: 1/24/2006
Descripton: Contract

DECLARATION OF HAROLD DOLEY

Pursuant to 28 USC § 1746, in lieu of a personal appearance, I Harold E. Doley Jr. make the following statement:

1. I am an adult Citizen of the United States, resident of the State of New York and have personal knowledge of the facts and matters attested to in this declaration.

2. Doley Securities LLC. is owned by the Doley Foundation LLC, which exists to support and advance the educational project known as the "Thurgood Marshall College Scholarship Fund". I am not a stockholder, corporate officer or Board Member of Doley Securities LLC.

3. The corrected declaration of Mr. Thomas M. Buchanan, Esq. is untrue. I categorically deny paragraphs 7 & 8. I never "understood and accepted" a rate of $480.00 per hr. for Mr. Mancusi. I agreed to pay only the lowest rate for partners and associates and Mr. Buchanan understood that. The contract I signed set a rate schedule showing the lower rate, If what Mr. Buchanan said was true he would have placed it in the contract as he did his own rate.

4. When we signed the agreement it was understood by Mr. Buchanan that the lowest range for Mr. Mancuso was $405.00 per hr., other associates was $200.00 per hr. and legal assistants $135.00. All of our preliminary discussions focused on the fact that we would and could only pay the very basic and lowest cost for professionals and legal assistances.

5. The first bill was sent on June 28. 2007 and it totaled $68,931 and reflected rates for the partner, associate which were not the lowest rate as agreed. We objected and were told it was their error and that a corrected bill would be
sent. The second bill was sent on July 18, 2007 and it added $20,253.97 and reflected rates for the partner and

associate other than what we agreed. We objected. It seemed to be the same bill as before but with more money added.
The third bill was issued in August and it added $5.253.97 reflecting the same rates as before. The $10.000 retainer was never reflected in the bill.

6. The day before the deposition I complained about the bill and was told by Mr. Mancusi that they (accounting) was having problems with their billing. He stated "I am not an accountant". The Deposition took place on June 5, 2007. Even though I told them the bills have been consistently incorrect, we were always being put off. The was never a full discussion over a corrected bill. The June 28, 2007 bill, the July 18, 2007 and the August 28, 2007 bill reflected no change whatsoever in the hourly rate or the $10,000 credit. We were told by Mr. Mancusi to wait for the corrected bill. It never came.

7. The $10,000 credit was never credited until after the suit was filed. Mr. Counts and I explained our position as to the fees and hours incorrectly posted and offered to pay $40,000 minus the $10,000 paid. The minimum
amounts in the range should have been $405.00 for a partner and $200.00 for an

associate. This would have reduced the bill by $21,321.75. The hours expended were excessive and the $10,000.00 was never reflected.

8. Mr. Buchanan in his corrected affidavit stated that I had agreed to Mr. Mancusi's specific fee. I state that I did not rather I asserted at all times we could only pay the minimum range of fees for other lawyers and assistants. Mr. Buchanan was incorrect about having a meeting with Mr. Chad Roberts and by "Errata" changed his declaration. He is incorrect about our preliminary understanding. A fact finder must determine who is telling the truth. The signed contract for legal services did not give W&S discretion to assign a fee so long as it was within a range. The very fact that Mr. Buchanan, in his two attempts to declare the truth, under oath, tried to make a point that we agreed to a specific fee for Mr. Mancusi, illustrates inconsistency, confusion and indifference to the truth. There is a significant question of fact here and the Law Firm has the burden of being above board. Contracts for legal services should not be oppressive and vague to the advantage of Lawyers. This question is material.

I declare under penalty of perjury that the foregoing is true and correct to the best of my

knowledge and belief.
/s/
Harold Doley
Subscribed and sworn to this 6th day of July, 2009

Notary Public
s/ Louis A. Gerdes, Jr. Bar No. 6030

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,
Plaintiff
Vs.
HAROLD E. DOLEY and
DOLEY SECURITIES, INC.,
Defendants

Case 1:08-CV 00144
Assigned to: Walton, Reggie B
Assign Date: 1/24/2006
Description: Contract

DECLARATION OF ALLEN COUNTS ESQ.

Pursuant to 28 USC 1746, in lieu of personal appearance, I ALLEN COUNTS make the following statement:

I am counsel to Harold Doley and I have personal knowledge of the facts and matters attested to in this declaration.

1. I have read the declarations of Mr. Buchanan and Mr. Mancusi of the Law Firm of Winston & Strawn LLP as well as the complaint and all the invoices sent to Mr. Harold Doley.

2. I personally responded to the invoices dated June 28, 2007, July 18, 2007 and August 28, 2007 by contacting the Law firm and advising them that the bill was incorrect.

3. On each occasion they apologized and stated that they were having problems with their own accounting. On behalf of Harold Doley I advised them that the bill would not be paid because the hours were out of line and the hourly rate was incorrect.

4. On the second billing I again rejected the accounting and advised them that they had not corrected the mistakes as to the hourly rate, the number of hours and there was no reflection or accounting of the $10,000 payment. They again apologized and stated again they were having problems with their accounting department.

5. The Invoice dated 08/28/07 stated a new total of $54,412.19 without reflection any of the objections I had raised as to the hourly rate, the total number of hours and the Payment of $10,000.

6. I advised our District of Columbia attorney to prepare a letter reflecting our position as the amount owed which is attached. Harold Doley has computed the amount due to the law Firm of Winston & Strawn LLP to be $20,000.00. The amount is consistent with the concerns and objections I raised to the Law Firm Accounting representative.

_____

Allen Counts Esq.
Subscribed and sworn to this 5 day of March 2009

Notary Public

Keith A. Doley
Notary Public
LA Bar No. 18187
Parish of Orleans, State of Louisiana

My commission is issued for Life

s/_____

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,
Plaintiff,

Vs. Case 1:08-CV 00144

HAROLD E. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

Assigned to: Walton, Reggie B.
Assign Date: 1/24/2006
Description: Contract

ANSWER OF ALLEN W. COUNTS ESQ. TO THE INTERROGATORIES OF THE PLAINTIFF WINSTON & STRAWN, LLP

Comes now Allen W. Counts, Esq. by and through Claude Roxborough, Esq. and respectfully answers the plaintiff's Interrogatories as follows: Interrogatory No.1 Identify all instances in which you, or someone on your behalf, complained about the Winston & Strawn invoices in which you, or someone on your behalf to any representative of Winston & Strawn. For each such instance, identify the individual of individuals who complained to Winston & Strawn, the date of each complaint, the substance of the complaint, the person at Winston & Strawn who received the complaint, and any and all documents that relate to the complaint.

ANSWER:

On behalf of Doley Securities and Harold Doley, I was requested to contact Winston & Strawn regarding a legal bill and billing statements for legal services. After speaking with Chad Robert, President of Doley Securities, it was apparent that the legal bill was incorrect as the $10,000 initial retainer was never reflected. I began conversing by phone with Michael Mancusi in October 2007 and advised him at that time that the bill for legal services was incorrect. The bill did not reflect the amounts already paid and the billing rate was not what had been agreed to by Mr. Harold Doley on behalf of the Corporation.

Interrogatory No. 2 Identify the date on which you retained Allen Counts to communicate with Winston & Strawn, concerning this matter.

ANSWER:

I was never "retained" by Harold Doley or Doley Securities. I am the Chairman and an attorney and as such Harold Doley asked me to call Winston & Strawn about the bill. I am not General Counsel for Doley Securities. I was asked to reach out to Winston and Strawn as early as September 2007 regarding the inaccurateness and excessively high amount of the legal bill for the services provided. I began speaking with Michael Mancusi about these matters in October 2007.

Interrogatory No. 3 – Identify the dates of each communication between Allen Counts and Winston & Strawn, and the purpose of each communication.

For each such communication, identify the date of each communication, the substance of the communication, the person at Winston & Strawn who received the Communication, and any and all documents that related to the communications.

ANSWER:

October 9, 2007 my office in Oklahoma received a call from Michael Mancusi and my secretary took the call along with his secretaries name (Bea) and Mr. Mancusi's cell phone number and advised him I was traveling and I would return his call. I spoke with Chad Robert to make sure the bill did not reflect the amount and reviewed the contract and called Mr. Mancusi back on my cell phone some time after October 7. Conversation was regarding the bill and our dispute thereof.

October 17, 2007 my office received a call from Michael Mancusi while I was traveling. My secretary retrieved the message from the answering machine (he called at 7:30 am) at the Oklahoma office, noted the call on the call log and sent me an email with Mr. Mancusi's information. I was tied up in meetings most of the trip and I advised my secretary to let Mr. Mancusi know I would call him on Friday when my schedule was free.

October 18, 2007 my office received a call from Mr. Mancusi and my secretary advised him I would call him back on Friday morning.

I returned Mr. Mancusi's call and advised him I had been traveling and told him that the bill was

incorrect and excessive and we had several discrepancies from what was laid out in the contract that was signed as far as rates, etc. He advised he would try to get a correct bill that included the credit for the $10,000 retainer and would check with billing to see what could be done. This began our dispute of the legal bill with Winston & Strawn.

November 11, 2007 my office received a call from Mr. Tom Buchanan and in my conversations with him, I reiterated the bill and the billing amount were incorrect as a 8 hour deposition (of which most of this time politics was being discussed) should be billed at over $90,000 (not including the retainer). He was well aware that we were disputing this bill as early as September. We were going to try to come to some sort of settlement at which time I offered a payment of $40,000 less the $10,000 retainer fee for an amount of $30,000 as the amount billed and the amount of work performed did not coincide in the least. We had even discussed a payment plan for the offer. He said he would get back to me on the offer.

January 16, 2008 Mr. Tom Buchanan called my Oklahoma office and left a message for me to give him a call. I do not recall the exact date I called him back but they did not want to accept our settlement.

_____

Allen W. Counts, Esq.

CHECK: DOLEY SECURITIES

First NBC Bank

14-05430650

Doley Securities, LLC #1685

Ten Thousand Dollars Retainer Ofc. Thrift Supervision

Pay to the Order of Winston & Strawn 4/20/07

$ 10,000.00

Doley Securities

S/ Chad Robert
Authorizing Signature

Doley Securities, LLC. 1685

Winston & Strawn LLP Retainer-Ofc. of Thrift Supervision 4/20/07

Professional Fees	10,000.00
Total	10,000.00

INVOICE WINSTON & STRAWN, LLP

WINSTON & STRAWN, LLP

HAROLD DOLEY/DOLEY SECURITIES May 14, 2008 T.M. Buchanan

Statement of Account
Invoice Over 60 days

Client: 105438-Harold Doley/Doley Securities
Matter: 0001-OTS Investrigation

Invoice #	Date	Amount	Credit	Total
1993138	6/28/07	68,931.85	10,000.00	58,931.85
1996231	7/18/07	20,226.37	0.00	20,226.37
2002543	8/28/07	5,253.97	0.00	5,253.97

Total for Matter 0001	84,412.19
Balance Outstanding	$84,412.19

INVOICE WINSTON & STRAWN, LLP

WINSTON & STRAWN, LLP

HAROLD DOLEY/DOLEY SECURITIES April 16, 2008 T.M. Buchanan

Statement of Account
Invoice Over 60 days

Client: 105438-Harold Doley/Doley Securities
Matter: 0001-OTS Investigation

Invoice #	Date	Amount	Credit	Total
1993138	6/28/07	68,931.85	10,000.00	58,931.85
1996231	7/18/07	20,226.37	0.00	20,226.37
2002543	8/28/07	5,253.97	0.00	5,253.97

Total for Matter 0001	84,412.19
Balance Outstanding	$84,412.19

INVOICE WINSTON & STRAWN, LLP

WINSTON & STRAWN, LLP

HAROLD DOLEY/DOLEY SECURITIES March 13, 2008 T.M. Buchanan

Statement of Account
Invoice Over 60 days

Client: 105438-Harold Doley/Doley Securities
Matter: 0001-OTS Investigation

Invoice #	Date	Amount	Credit	Total
1993138	6/28/07	68,931.85	10,000.00	58,931.85
1996231	7/18/07	20,226.37	0.00	20,226.37
2002543	8/28/07	5,253.97	0.00	5,253.97

Total for Matter 0001	84,412.19
Balance Outstanding	$84,412.19

UNITED STATS DISTRICT COURT
District of Columbia

WINSTON &. STRAWN, LLP.
Plaintiff,
Vs. Case: 1 :08-CV 00144
HAROLD F. DOLEY
DOLEY SECURITIES
Defendants.

Assigned to: Walton, Reggie B
Assign Date: 1/24/2006
Description: Contract

DECLARATION OF CHAD ROBERT

Pursuant to 28 USC § 1746, in lieu of a personal appearance, I Chad Robert make the following statement:

I am an adult Citizen of the United States and the president of Doley Securities, Inc. and a resident of the State of Louisiana and I have personal knowledge of the facts and matters attested to in this declaration.

I. I have read the declaration of Mr. Thomas Buchanan, Esq. and am incredulous. No such meeting ever took place. I have never been in Washmgton, DC period, let alone to meet with either Mr. Buchanan or Mr. Mancusi.

2. The assertions in paragraphs 7 and 8 of the declaration of Mr. Buchanan Esq. are completely untrue.

/Chad Roberts

Subscribed and sworn to this 29th day of April, 2008

Notary Public.

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,
Plaintiff,
Vs.
HAROLD E. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants

Case: 1:08-CV 00144
Assigned to: Walton, Reggie B
Assign Date: *1124/2006*

DECLARATION OF HAROLD DOLEY

Pursuant to 28 USC § 1746, in lieu of a personal appearance, I Harold Doley make the following statement:

1. I am an adult Citizen of the United States, resident of the State of New York and have personal knowledge of the facts and matters attested to in this declaration.

2. I have read the declaration of Mr. Thomas M. Buchanan, Esq. particularly paragraphs 7 & 8 and categorically deny that there was ever a preliminary meeting with Mr. Chad Robert, Mr. Buchanan, Mr. Mancusi and myself, wherein the hourly rate for Mr. Mancusi and other associates was discussed. It is

shocking that such would be said under oath by Mr. Buchanan. No such meeting ever took place.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Harold Doley

Law Office of
KIMMEL & ROXBOROUGH, LLC
709 Irving St., NW
Washington, DC 20010
(202) 368-8847
roxboroughl@Aol.com

April 20, 2008
Mr. Charles Klein
Winston & Strawn LLP
1700 K Street, NW
Washington, DC

Re: Winston & Strawn LLP vs. Harold Doley et al
1:08-cv-00144, analysis formula for possible settlement

Dear Sir:

As you know I have filed a motion to dismiss the above entitled case or in the alternative for a more definite statement. My motion addresses what I conclude to be an indefinite contract where certain essential terms were not defined. That contract was, therefore, without mutual assent. However, Quantum Merit would still apply despite the technical failure of its terms.

In my preliminary analysis I cited the following terms in the contract signed with the law firm.
2. Fees. Although I will be the attorney responsible for this engagement, portions of the work may be performed by other firm attorneys and legal assistant, as necessary. My current hourly rate is

$595.00. Our hourly rates for partners range from $405.00 to $845.00; for associates, from $200.00 to $590.00; and for legal assistants, from $135 to $285.00. Our billing rates are subject to adjustment from time to time, usually in January of each year. Each of you will be jointly and severally liable for the total fees and costs of representing you collectively in this lawsuit.

Comparing the bill with the contract it seems clear, the only definite fee stated was that of Mr. Thomas Buchanan. The partners and associates were a range of possible fees. The bill shows Mr. Mancusi charged $480.00, an amount with the range of a partner and Mr. Court charging $365.00, an amount within the range of an associate. There was no evidence of any collateral agreement as to those fees for them thus my clients only agreed to pay the minimum amount. Those minimum amounts would be $405.00 for a partner and $200.00 for an associate. My clients feel that the amount of time for the review of documents, most of which were from Sullivan & Cromwell LLP, and preparation of him for the deposition was excessive. They reviewed the bill and proffered the following adjustments.

INVOICE No. 1993138

INVOICE DATE 06/28/07

(PROPOSED ADJUSTMENT)

Timekeeper Summary

Attorney/other prof	Hours	Rate	Fees billed
T. Buchanan	6.50	595.00	3,867.50
M. Mancusi	36.50	405.00	15,592.50
J. Court	37.50	200.00	7,500.00
Total Attorney/Other Prof	80.50		26,960.00

INVOICE NO. 1996231

INVOICE DATE 07/18/07

(PROPOSED ADJUSTMENT)

Timekeeper Summary

Attorney/other prof		Hours
Rate	Fees Billed	
T. Buchanan		4.75
595.00	2,826.25	
M. Mancusi		8.75
405.00	3,442.50	
J. Court		12.5
200.00	2,200.00	
Total Attorney/Other Pro		25.75
	8,468.75	

INVOICE NO. 2002543

INVOICE DATE 07/18/07

PROPOSED ADJUSTMENT)

Timekeeper Summary

Attorney/other prof		Hours
Rate	Fees Billed	
T. Buchanan		1.00
595.00	595.00	
M.Mancusi		3.5
405.00	1,417.50	
J. Court		8.5
200.00	1,750.00	
Total Attorney/Other		
Prof		13.00
	3,762.50	

Total proposed adjustment
$39,191.25

Less Amount Paid
$10,000.00

Total proposed due
$ 29,191.25

My clients are prepared to pay immediately $20,000.00 in full settlement of this matter. They feel strongly that the hours of Mancusi and Court were essentially duplicative.

We make this offer in good faith and is the best assessment of the services given in the matter of preparation for a Deposition. We feel that the hours expended were duplicative. Your firm failed to take into account my clients initial position that they could not afford to pay a great deal on this matter. They never agreed to the level of fee and quantity of time stated in the bill. Had my clients been apprised of the likelihood of being charged over $90,000.00 for preparation for a deposition they could have never retained your very excellent firm.

It is our hope that you accept an immediate payment of $20,000.00 offered here in full satisfaction of this entire matter.

Sincerely

Claude Roxborough

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN, LLP,

Plaintiff,

Vs. Case No. 1:08-cv00144(RBW)

HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,

Defendants.

CORRECTED DECLARATION OF THOMAS M. BUCHANAN, ESQ.

Pursuant to 28 U.S.C. § 1746, in lieu of a personal appearance, I, Thomas Buchanan, make the following statement:

1. I am over 21 years of age, and I have personal knowledge of the facts and matters attested to in this Declaration, and I am competent to be a witness to the facts and matters attested to in this Declaration.

2. I am a partner with Winston & Strawn LLP ("W&S"), which is an international law firm with offices through the United States and abroad.

I. The Defendants

3. Harold E. Doley is an experienced businessman. According to the website of Doley

Securities, Inc. ("DSI"), he is the founder of DSI, has been an individual seat holder on the New York Stock Exchange since 1973, and is an underwriting member of Lloyd's of London. *See* Attachment 1 (Company Information).

4. According to its website, DSI was founded in 1973. It specializes in providing investment products and services to institutional clients, and its specialties include raising capital for securities issuers, providing secondary market services for institutional investors, and furnishing financial advisory services to institutions, corporations, government and political subdivisions. *See id.* Chad Robert serves as the President of DSI.

II. Background

5. Before Mr. Doley and DSI retained W&S, the Office of Thrift Supervision ("OTS") served on Defendants a subpoena for documents. In response, Defendants produced thousands of pages of documents to the OTS.

6. OTS issued a second subpoena to Defendants requesting additional documents and Mr. Doley's deposition. In the early spring of 2007, after the return date of the second round of documents had already passed but before any documents were produced, Defendants approached W&S seeking legal counsel.

7. Before W&S's representation of Defendants began, a partner of mine, Michael A.

Mancusi, and I met in person with Mr. Doley, who was representing his interest and the interests of DSI. Mr. Mancusi and I explained to Mr. Doley the legal work that would need to be done to properly represent Mr. Doley and DSI. We explained that we needed to review the documents they already produced, and also review more documents that could be responsive to the second subpoena. In addition, we explained that we would need to prepare Mr. Doley for his deposition and then defend his deposition. At the meeting, Mr. Doley indicated to me that he understood what W&S's work would entail.

8. During that initial meeting, Mr. Mancusi and I also explained the fees and costs that would be associated with W&S's representation of Defendants. In particular, I described that the matter would be billed on an hourly rate basis, in quarterly increments, and that my hourly billing rate was $595 and Mr. Mancusi's billing rate was $480. We also explained that associates of W&S may also be working on the matter, but they would bill at lower hourly rates. Mr. Doley told Mr. Mancusi and me that he understood and accepted the fees and costs that were associated with W&S's work on the matter.

III. The Parties' Agreement

9. On April 19, 2007, before W&S conducted any work on behalf of Defendants, I sent to both Mr. Doley and DSI an engagement letter agreement to memorialize the parties' agreement. This agreement provides, among other things, that

"the firm's clients will be clients Harold Doley and Doley Securities, Inc. The scope of our engagement will be limited to the representation of each of you in the [investigation being conducted by the OTS]." The agreement also states that W&S's "policy at the outset of an engagement with new clients is to outline not only the nature of the engagement, but also the basis on which the firm will provide legal services and bill for them." *See* Attachment 2 Ltr. Agree. At 1).

10. The letter agreement states, in part, that W&S's fees for work on the matter would be determined on an hourly basis. I provided Defendants with my then-current hourly rate of $595, as well as the hourly rate ranges for partners, associates, and legal assistants. *See id.* (Ltr. Agree. At ¶ 2)

11. The letter agreement also states that there would be costs associated with W&S's representation of Defendants in addition to W&S's legal fees. See id. (Ltr. Agree. At ¶ 3)

12. The letter agreement also states that W&S renders on-account bills monthly and expects its clients to pay account statements within 30 days. See id. (Ltr. Agree. At ¶ 4).

13. The letter agreement also requested that Defendants pay a "$10,000 retainer to initiate the engagement" and explained that "[t]his retainer will be applied against ongoing fees and expenses." (Ltr. Agree. At ¶ 10).

14. Mr. Doley signed the letter agreement on April 20, 2007, on his behalf, and Mr. Robert

signed the engagement letter on April 20, 2007, on behalf of DSI. In the letter agreement, both Mr. Doley and DSI acknowledged that they were given the opportunity to consult with independent counsel before signing the engagement letter. *See* id. (Ltr. Agree. At 4).

15. Mr. Doley and DSI paid the $10,000 retainer on May 23, 2007.

IV. W&S's Performance Under the Agreement

16. W&S performed legal services on behalf of Defendants after the parties executed the engagement letter agreement. First, there was a dispute over what OTS claimed Defendants produced pursuant to the first subpoena, and what Defendants believed that they produced. In connection with this dispute, W&S had to review the thousands of pages of documents that were produced pursuant to the first subpoena and then meet with OTS representatives to compare what they received to what Defendants believed was produced. Second, W&S needed to review thousands of additional pages to determine if Defendants needed to supplement their production based on the second OTS subpoena. As those documents were due before W&S even began its representation of Defendants, W&S had to conduct their document review over a short period time, and the firm did produce additional documents on behalf of Defendants. Third, W&S had to prepare Doley for his deposition. The firm also defended Doley's deposition. Finally, W&S provided legal advice to Defendants regarding certain purchases of stock.

17. This legal work was performed by me, Mr. Mancusi, and an associate. As described in the letter agreement, my billing rate was $595. Mr. Mancusi's billing rate was $480, and Mr. Court billed at a rate of $365. *See* Attachment 3 (Invoices).

18. In total W&S devoted 215.25 of legal work on behalf of Defendants. Mr. Mancusi billed 102 hours, Mr. Court billed 101 hours, and I billed 12.25 hours. All of this work was appropriate and necessary to W&S's representation of Defendants *See id* (Invoices).

V. Defendants' Breach of The Agreement

19. W&S sent three bills to Defendants in June, July and August of 2007. The June bill totaled $68,931.85, the July bill totaled $20,226.37, and the August bill totaled $5,253.97. All three bills not only described the total amount of charges, but also gave a description of the work performed by Mr. Mancusi, Mr. Court and me. The total charges to Defendants was $94,412.19. *See* id. Invoices). W&S sent Defendants monthly statements of account – statements Defendants never contested. *See* Attachment 4 (Statements of Account).

20. Defendants never complained to W&S about the quality or quantity of work that W&S was performing. Nor did Defendants ever complain outside the context of this lawsuit about the amount W&S charged for its legal services on behalf of Defendants. But that payment never came.

21. W&S applied the $10,000 retainer to amounts owed by Defendants to the law firm. To date, Defendants owe W&S $84,412.19.

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,
Plaintiff,

Vs. Case: 1:08-CV 00144

HAROLD F. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

Assigned to: Walton, ReggieB.
Assign Date: 1/24/2006
Description: Contract

ANSWER TO THE COMPLAINT

Comes now the defendants Doley Securities Inc. and Harold Doley by and through its attorney Claude Roxborough Esq. For their answer to the complaint of Winston & Strawn, LLP., states the following:

1. The defendants admit to the allegations stated in paragraph 1,2,3,4,56,8,9, 10, 11, 12, and 17. of the plaintiff's complaint.

2. The defendants deny the allegations contained in paragraph 7. 13. 14, 15, 16, 17, 18, 19 of the plaintiffs complaint.

Wherefore, the plaintiff admits that work was performed by the plaintiff but demands strict proof that the rates charged were in fact agreed upon and that the extraordinary hours stated

were indeed performed.

Respectfully Submitted

_____Claude ROXBOROUGH_____

Claude Roxborough, Esq. 162313
709 Irving St. NW
Washington, DC 20010
202 368 8847

CERTIFICATE OF SERVICE

I, Claude Roxborough Esq. hereby certify that a copy of the foregoing was mailed postage prepaid to Thomas Buchanan 1700 K Street, NW, Washington, DC 20006 this 20 day of May 2009.

_/s/Claude Roxborough _____
Claude Roxborough

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN, LLP,
Plaintiff,
vs. Case No: 1:08-cv-00144 (RBW)
HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,
Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER

Defendants' Motion to Reconsider should be summarily denied. On June 29, 2009, this Court granted summary judgment for Plaintiff against Defendants, jointly and severally, in the amount of $84,412.19, plus prejudgment interest and costs. *See* Dkt. 31. In their Motion to Reconsider, Defendants have not even attempted to meet the strict standard for reconsideration by arguing that there has been an intervening change of controlling law, or that there now exists evidence that was not available to them before summary judgment was entered. As discussed in more depth below, therefore, Defendants have not met their burden to clearly establish a manifest error of law or fact sufficient to warrant reconsideration of summary judgment.

A motion for reconsideration under Federal Rules of Evidence 59(e) and 60(b) "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or

prevent manifest injustice." *Agrocomplect, AD v. Rep. of Iraq*, 247 F.R.D. 213, 215 (D.D.C. 2008) (Walton, J.) (*quoting Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006); *see also* FED.R. CIV. 59(e) and 60(b). The movant bears the burden to "clearly establish a manifest error of law
[page 2]
or fact." *Ctr. for Sci. in the Pub. Interest v. FDA*, No. Civ. A. 03-1962, 2004 WL 2218656, at *2 (D.D.C. Sept. 17, 2004) (Walton, J.). As this Court has stated previously, "motions for reconsideration under Rule 59(e) are 'disfavored' and 'should be granted only under extraordinary circumstances.'" *Agrocomplect,* 247 F.R.D. at 215; *Ctr. for Sci. in the Pub. Interest,* 2004 WL 2218656, at *2. Defendants offer three arguments for reconsideration, but none has any merit.

First, Defendants argue based solely on a belated declaration of Defendant Harold E. Doley that there is a triable issue material issue of fact as to whether Defendants agreed to pay only the lowest range of fees listed in the parties' contract. But this declaration is hardly "new evidence." In fact, Defendants offer no excuse for failing to submit this evidence with Defendants' opposition to summary judgment. They inexplicably waited until after losing summary judgment to raise this purported triable issue of material fact. Such delay cannot support reconsideration. This Court previously rejected a similar motion to reconsider where the motion relied on information that was available to the moving party before a dismissal order was entered. *See Agrocomplect,* 247 F.R.D. at 215, n.5.

Even if the Doley declaration were new evidence (which it is not), it still would not raise a triable issue of *material* fact. This Court, in rejecting Defendants' motion to dismiss, previously held that the letter agreement signed between Plaintiff and Defendants is a binding and enforceable contract. *See* Dkt. 17. This enforceable contract unambiguously discusses the range of rates for partners and associates: "Our hourly rates for partners range from $405.00 to $845.00; for associates, from $200.00 to $590.00," and at no point even hints that Defendants would be charged fees only in the low end of the ranges. Dkt. 10-7, pg 12. The Doley declaration thus constitutes inadmissible and non-contemporaneous parol evidence that is

[page 3]

insufficient as a matter of law to raise a material issue of fact for trial. *See U.S. ex rel D.L.I. Inc. v. Allegheny Jefferson Millwork, LLC*, 540 F.Supp.2d 165, 172 (D.D.C. 2008) ("When the parties to a contract have reduced their entire agreement to writing, the court will disregard and treat as legally inoperative parol evidence of prior negotiations and oral agreements"); *Ulliman Schutte Const., LLC v. Emerson Process Management Power & Water Solutions*, No. Civ.A. 02-1987(RMC), 2006 WL 1102838 at *11 (D.D.C. March 31, 2006) ("If a writing constitutes the parties' 'entire contract,' the parol evidence rule applies, and 'evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract.'")

Second, Defendants argue that reconsideration is warranted because early bills issued by Plaintiff did

not credit Defendants for their $10,000 retainer. This is a complete nonissue that was raised and resolved at the summary judgment hearing. As Plaintiff explained in its summary judgment papers and at oral argument, the $10,000 retainer was applied to Defendants' bills and subtracted from the total that Defendants owe. *See* Dkt. 12-2 at 5, ¶ 20; Dkt. 10-7 at 45 (statement showing $10,000 credit given to Defendants). This Court's judgment accurately takes into account the $10,000 credit. *See* Dkt. 31. Defendants do not, and cannot, argue otherwise. *See Ctr. for Sci. in the Pub. Interest*, 2004 WL 2218656, at *2 ("A motion to reconsider a judgment dismissing one's claim is 'not simply an opportunity to reargue facts and theories upon which a court has already ruled'").

Finally, Defendants argue that this case should have been subject to arbitration. This argument, like the others, is not supported by any change in controlling law or new evidence. It also is untimely. This issue was fully briefed by the parties and was decided by this Court on February 10, 2009. *See* Dkt. 18, Dkt. 19, and Dkt. 20. Any motion for reconsideration
[page 4]
on this issue has long passed. FED. R.CIV. 59(e) ("[a] motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment").

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny Defendants' Motion to Reconsider.
Respectfully submitted,

_____\s_____
Thomas M. Buchanan # 337907
Charles B. Klein, # 450984
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000
Dated: July 21, 2009 *Counsel for Plaintiff*

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,
Plaintiff,

Vs. Case: 1:08-CV 00144

HAROLD F. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

Assigned to: Walton, Reggie B
Assign Date: 1/24/2006
Description: Contract

MOTION OF THE DEFENDANT'S HAROLD E. DOLEY AND DOLEY SECURITIES, INC. TO DISMISS THE COMPLAINT, OR IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT
(Oral Hearing Requested)

Defendants Harold E. Doley and Doley Securities, Inc., by and through their undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(b)(6), and 12(e), respectfully requests that this Court dismiss with Prejudice Plaintiff's Complaint, or in the alternative, compel Plaintiff to draft a more definite statement of his claims.

This case arises from allegations made by the Law firm of Winston & Strawn, LLP. that the defendants owe plaintiff $ 84,412.19 for legal

assistance in one deposition taken by the Office of Thrift Supervision on July 18, 2007. The plaintiff suggests that a document signed on April 19, 2007 was a contract which the defendants breached. The contract was indefinite as to the specific hourly rates that would be charged by firm attorneys, legal assistant but specified a broad range of possible fees and was not definite. The Contract's indefiniteness renders the contract void and as such warrants the dismissal of this complaint with prejudice. In the alternative because the complaint is so vague and ambiguous, the defendants cannot reasonably be required to frame a responsive pleading and request a more definite statement.

The reasons therefore are more specifically addressed in the accompanying Memorandum of points and authorities attached hereto.

Respectfully Submitted

__/Claude ROXBOROUGH_____
Claude Roxborough Esq. 162313
709 Irving St. NW
Washington, DC 20010
202 368 8847

CERTIFICATE OF SERVICE

I Claude Roxborough Esq. hereby certify that a copy of the foregoing was mailed postage prepaid to Thomas Buchanan 1700 K Street, NW, Washington, DC 20006 this day of 2008.
__/s/Claude Roxborough_____

Claude Roxborough

ORAL HEARING REQUESTED
The Defendants respectfully request and oral hearing on this motion.

UNITED STATES DISTRICT COURT
District of Columbia

WINSTON & STRAWN, LLP,

Plaintiff,

Vs. Case: 1:08-CV 00144

HAROLD F. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

Assigned to: Walton, Reggie B
Assign Date: 1/24/2006
Description: Contract

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF THE DEFENDANT'S HAROLD E. DOLEY AND DOLEY SECURITIES, INC. TO DISMISS THE COMPLAINT, OR IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

TABLE OF CONTENTS

I. Introduction 3
II. Factual Background 3
III. Argument 4
A. Standard for Motion to Dismiss 4
B. Standard for Motion for More Definite Statement 4
C. Contract 4
IV. Conclusion 5

I. INTRODUCTION

Defendant's Harold E. Doley and Doley Securities, INC. ("Doley") hereby respectfully moves this Court for an Order dismissing the Complaint filed by Plaintiff Winston & Strawn, LLP with prejudice for failure to state a claim upon which relief may be granted. In the alternative, Harold E. Doley and Doley Securities, INC. ("Doley") respectfully requests an Order compelling Plaintiff to file a more definite statement of their case.

II. FACTUAL BACKGROUND

Defendant's Harold E. Doley and Doley Securities, Inc... ("Doley") sought legal advice regarding a subpoena for a deposition to be conducted by the Office of The Thrift Supervision. They were not targets of the investigation or parties to any lawsuit related to Independence Federal Savings and Loan Inc. The defendants paid $10,000.00 for legal assistance in the preparation for their deposition. An agreement was tendered by the plaintiff Winston & Strawn LLP., to provide representation in the investigation which was indefinite as to the amount to be paid for hourly services providing only a range. Throughout the very limited representation of the Defendants by the Plaintiff, fees for partners, associates and legal assistance were never defined. The April 19, 2007 agreement was and remained unduly uncertain and so indefinite that no contract was formed. The plaintiff provided assistance for only one deposition. After which their services were no longer needed.

III. ARGUMENT

1. Standard for Motion to Dismiss

When considering a Federal Rules of Civil Procedure, FRCP12(b)(6) motion based on a defendant's assertion that plaintiff fails to state a claim upon which relief can be granted, this Court's evaluation is limited to the four corners of the Complaint. See *Aronoff v. Lenkin Co.,* 618 A.2d 669, 684 (D.C. 1992) (citations omitted). In reviewing such a motion, this Court accepts all allegations in the Complaint as true, and construes the pleading in the light most favorable to the plaintiff. Id. In doing so, however, this Court must dismiss vague and conclusory allegations because such statements cannot substitute for the required statement of facts necessary to state a claim. See *Leonard v. District of Columbia,* 704 A. 2d 618, 630-31(D.C. 2002). Dismisal is also proper when it appears that a plaintiff can prove no legally sufficient facts to support the claim for relief. See *Schiff v. American Assn of Retired Persons*, 697 A. 2d 1193, 1196 (D.C. 1997).

Applying these standards here, Plaintiffs' Complaint must be dismissed in its entirety. Not only are all allegations vague, conclusory, and wholly lacking in substance, but there is also no set of facts under which Plaintiffs can state viable claims given the allegations raised in their Complaint. Dismissal is proper since Plaintiff cannot prove any legally sufficient facts to support his claim for relief.

2. Standard for Motion for a More Definite Statement

By the language of FRCP12(e) itself, "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement...." Courts will examine the pleading for "vagueness or lack of clarity," see *McDaniel* v. *Cusimano,* 148 A.2d 303, 305 (D.C. 1959) (analyzing the District of Columbia Rules of Procedure), or, in the alternative, for "sufficient definiteness to enable the defendant to frame an answer," see *Montgomery v. Kingsland,* 166 F.2d 953, 956 (D.C. Cir. 1948) (analyzing the Federal Rules of Civil Procedure.

The Plaintiff States in the Complaint the following:

This matter is a simple breach of contract case that cannot be more clear. Defendants agreed by written contract for W&S to represent them in a legal matter, and in exchange, to pay W&S for its legal services. The fees and cost of W&S's legal services were explained to Defendants both orally and in the written agreement. W&S performed legal services on behalf of Defendants at the rates that were spelled out in the written agreement, and without complaint from Defendants. As a result of the work performed by W&S on behalf of Defendants, Defendants owe W&S $ 84,412.19, which Defendants have not paid, and thus defendants have breached a written contract with W&S.

The alleged contract referred to by the Plaintiff is not clear and appears to be nothing more than a rate

sheet with ranges of possible charges from various possible service providers in the firm. The complaint fails to identify in any paragraph what charges from any specific provider was identified charged and or refused. Although the parties may have manifested an intention to make a contract, if the content of their agreement is unduly uncertain and indefinite no contract is formed. Restatements, Contracts (2d) § 32 (1); Corbin § 95; 1 Williston § 37' *Parks v. Atlanta News Agency, Inc*, 115 Ga. App. 842,156 S.E. 2d 137.

c. Contract

The rule of contract law is that an "offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably" certain. Restatement, Contracts § 32. Material terms include subject matter, price, payment terms, quantity, quality, duration, and work to be done. 1 Williston §§ 38-48; 1 Corbin §§ 95-100. The requirement of definiteness cannot be pushed to extreme limits. However as Corbin says:

"In considering expressions of agreement, the courts must not hold the parties to some impossible, or ideal, or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty. In spite of its defects, language renders a practical service. In spite of ignorance as to the language they speak and write, with resulting error and misunderstanding, people must be held to the promises they make. The court must not be overly fearful of error; it must not be pedantic or meticulous

in interpretation of expressions." 1 Corbin § 95 The Courts do not agreements so as to carry into effect the reasonable intention of the parties, if that can be determined. *In re Wonderfair Stores, Inc.*, 511 F2d 1209.
favor the destruction of contracts because of uncertainty, but will, if feasible, construe

This claim, as currently stated, must be dismissed. The plaintiff seeks to enforce a contract that fails to recite duration, work to be done, and quantity of hours to be performed, by whom and at what specific rate. The alleged contract is so open ended as to constitute merely a work sheet listing ranges of possible charges that could be made for Quantum Merit work. While there is clearly, intent to be served by the plaintiff, the defendant did not agree to an open ended arbitrary assessment of fees in a representation for a single deposition. The complaint as such relies on an alleged failure to pay what plaintiff arbitrary suggest is owed from it's work sheet of ranges of possible charges and as such should be dismissed.

If the Court chooses not to dismiss the complaint it should require the plaintiff to specify what specific charge and time expended by the plaintiff and others responsible for the work performed. There should also be a clear statement or explanation as to where, when, how and what terms were breached by the defendants. Also, a specific detailed hour by hour involvement of each individual participant assigned by the plaintiff to the preparation for the deposition.

IV. CONCLUSION

For all of the foregoing reasons, the Defendants respectfully request that this court dismiss all of Plaintiff's claims with prejudice, and if certain claims as to the Defendant cannot be dismissed, Defendants respectfully request that this Court compel Plaintiff to frame a more definite statement of their claims.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN LLP,
Plaintiff,

vs. Case No. 1:08-CV 00144 (RBW)

HAROLD E. DOLEY, and
DOLEY SECURITIES, INC.,
Defendants.

PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
MOTION TO STAY
PROCEEDINGS

Plaintiff Winston & Strawn LLP, by and through its undersigned counsel, hereby opposes the Motion to Stay Proceedings to Allow Arbitration of Fee Dispute Before the Attorney Client Arbitration Board as Well as Defendants' Prosecution of Other Grievances filed by Defendants Harold E. Doley and Doley Securities, Inc. A proposed order is attached.

INTRODUCTION

Having filed and lost their motion seeking a dismissal with prejudice, Defendants now ask to stay this case while they seek judgment from a different tribunal. Defendants cannot seek this Court's judicial judgment and then, when not satisfied with it, obtain a second bite at the apple. They have waived their right to arbitrate the parties' dispute. The D.C. Circuit recently

addressed virtually identical facts and held that a stay of litigation in favor of arbitration constituted reversible error. In *Khan v. Parsons Global Servs.*, 521 F.3d 421 (D.C. Cir. 2008), the Court of Appeals held that arbitration should not have been compelled where, as here, the defendants actively participated in the litigation by filing a

dispositive motion. This is because "arbitration may not be used as a strategy to manipulate the legal process." *id* at 427 (citation omitted).

Khan is directly on point. As in *Khan*, Defendants have been fully aware for months of their right to arbitration. Yet, they moved to dismiss on the merits and, in fact, even invited the Court to consider matters outside the pleadings. Having decided to move for dismissal with prejudice rather than arbitrate, Defendants "must now accept the result of its chosen litigation strategy: waiver of its right to compel arbitration." i*d* at 428. This is especially true here, where the case has been pending for almost a year already and further delay would prejudice Winston & Strawn.

As demonstrated in more depth below, this Court should swiftly deny Defendants' motion to stay and set a deadline for their opposition to Winston & Strawn's pending summary judgment motion.

BACKGROUND

This is a simple breach of contract case involving Defendants' failure to pay their legal fees. Defendant Harold E. Doley, an experienced businessman, and his company, Defendant Doley Securities, Inc., agreed in writing that Winston & Strawn would represent them in connection with a regulatory investigation by the Office of Thrift Supervision. In exchange, Defendants agreed to pay Winston & Strawn for these legal services.

Pursuant to that agreement, Winston & Strawn attorneys devoted more than 200 hours of billable work to representing Defendants and sent three invoices for legal services in June, July and August 2007 totaling more than $90,000. Defendants paid none of the invoices (although a $10,000 retainer was applied to the outstanding balance). Defendants never complained about the work performed or the bills for service until this litigation. *See* Dkt. 10,

Ex. 6 (Buchanan Decl. at paragraphs 3-19). The representation was successful in that no charges were brought against Defendants.

Before filing suit, Winston & Strawn attempted to negotiate payment from Defendants, but to no avail. At any point during these negotiations, Defendants could have sought to arbitrate the matter with the Attorney/Client

Arbitration Board of the District of Columbia Bar. But Defendants simply decided to ignore the requests for payment.

On January 24, 2008, after negotiations were unsuccessful, Winston & Strawn filed its Complaint for breach of contract. Dkt. 1. At that point, Defendants could have sought to have this matter arbitrated by the D.C. Bar. Again, Defendants chose not to arbitrate.

Instead, on March 7, 2008, Defendants moved to dismiss the Complaint on the merits, seeking a dismissal with prejudice. Dkt. 4 at 1 ("Defendants Harold E. Doley and Doley Securities, Inc., by and through their undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(b)(6), and 12(e), respectfully *requests that this Court dismiss with Prejudice* Plaintiff's Complaint") (emphasis added). On May 6, 2008, two months after moving to dismiss, Defendants filed a supplemental memorandum that attached two exhibits outside of the pleadings: (1) a settlement letter from Defendants' counsel, and (2) a declaration from the President of Do ley Securities Inc. *See* Dkt. 14 at Exs. 1 and 2.

In this supplemental pleading, Defendants recognized that they "could respectfully settle this dispute through arbitration with the Bar," thus confirming their knowledge of this arbitration right at the time. Dkt. 14 at 5. Nevertheless, Defendants opted for litigation and continued to ask this Court to dismiss the case on the merits.

On November 21, 2008, the Court heard---and denied---Defendants' motion to dismiss. Dkt. 17. It was only after this denial that Defendants first mentioned their intent to move to stay the case pending arbitration.

To date, Defendants have not officially requested arbitration with the D.C. Bar; the agreement to arbitrate and request for arbitration attached to Defendants' motion are not signed by either Defendant. *See* Dkt. 18 at 5-6. And the D.C. Bar has no record of request for arbitration by either Defendant. Nor have Defendants answered the Complaint even though that answer was due on December 10, 2008, ten days after the motion to dismiss was denied. [1]

ARGUMENT

1. Defendants Waived Their Right to Arbitrate This Dispute By Actively Participating In The Lawsuit.

D.C. Bar Rule XIII(a) reads an arbitration provision into the parties' contract for legal services by stating: "An attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services .... " But Defendants have waived that right to arbitration.

It is well established that the right to

arbitration, like any other contract right, can be waived. *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772,774 (D.C. Cir. 1987); *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966). It is equally clear that a party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. *Cornell*, 360 F.2d at 513; *Khan*, 521 F.3d at 425. Waiver may be found absent a showing of prejudice. *National Foundation*, 821

---

1 *See* FED R. Civ. P. 12(a)(4)(A) ("if the court denies the motion or postpones its disposition until trial. the responsive pleading must be served within 10 days after notice of the court's action"); FED R. Civ. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.").

F. 2d at 777. Once having waived the right to arbitrate, that party is barred from proceeding with arbitration. *Id.*

This case is controlled by the D.C. Circuit's recent decision in *Khan*. In that case, the D.C. Circuit reversed the district court's grant of

motion to compel arbitration, holding that the defendant waived his right to arbitrate by filing a summary judgment motion at the outset of the litigation. The Court reached this holding even though no answer was filed and discovery had not yet begun. The Court rejected the argument that, "at most . . . [only] a motion for summary judgment on the merits of an arbitrable claim, filed after substantial discovery, can waive the movant's right to arbitrate that claim." 521 F.3d at 426. Instead, the Court found a waiver of the right to arbitrate because the defendants knew they had such a right and, yet, decided to file a dispositive motion that referenced matters outside of the pleadings. As the Court explained, when a "party has made a decision to take advantage of the judicial system [he] should not be able thereafter to seek compelled arbitration ... thus indulging in 'a second bite at the very questions presented to the court for disposition.'" *Id.* at 426-27.

Khan is on point. Defendants have known about their right to arbitration since May 2008, at the latest. Dkt. 14 at 5. Yet, they made a conscious decision to proceed with the litigation in the hope that this Court would construe the allegations on the merits and dismiss the case with prejudice. In support of its motion to dismiss, Defendants even relied on evidence outside the pleadings----including a declaration from the president of Doley Securities----thus further taking action inconsistent with preserving the right to compel arbitration. *See id.* at 428; *see also St. Mary's Med. Ctr of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969 F.2d 585, 589 (7th

Cir. 1992) ("Submitting a case to the district court for decision is not consistent

with a desire to arbitrate. A party may not normally submit a claim for resolution in one forum and then, when it is disappointed with the result in that forum, seek another forum.").

After almost a year of litigation, it is far too late for Defendants to reverse course and seek a change of venue. In fact, delay in seeking arbitration has been viewed by the D.C. Circuit as a decision to waive arbitration. In *National Foundation,* the defendant waited about a year after the Supreme Court found an issue in the complaint was arbitrable before seeking arbitration. The Court of Appeals held that the defendant's "extended silence" and "much delayed demand for arbitration" showed that it had "made a conscious decision to continue to seek judicial judgment on the merits of [the plaintiffs] arbitrable claims." 821 F.2d at 777.

The same is true here. Defendants' intentional delay of almost a year after the Complaint was filed to seek arbitration should be deemed to have waived their right to arbitration. Although the issue of waiver was raised at the November 21 hearing, the cases Defendants cite do not discuss waiver at all. In those cases, unlike here, the clients sought arbitration at the earliest time possible, even before a complaint was filed in court. *See Bolton v. Bernabei & Katz, PLLC,* 954 A.2d 953,

957 (D.C. 2008); *Schwartz v. Chow,* 867 A.2d 230, 232 (D.C. 2005). Defendants have thus failed to justify their belated effort to compel arbitration

II. **Staying The Case Would Prejudice Winston & Strawn.**

As discussed above, waiver of the right to arbitrate may be found absent a showing of prejudice. *National Foundation,* 821 F.2d at 777. Nevertheless, Winston & Strawn would, in fact, be prejudiced if forced to abandon this litigation and start the case fresh before a different tribunal.

First, Winston & Strawn's invoices have been outstanding for over a year and a half. Repeated requests for payment have been met with delay----a delay that would be further

compounded if, as Defendants request, a year of litigation before this Court would be deemed wasted. If this matter were referred to arbitration, Winston & Strawn would have to begin its request for payment anew, thus essentially providing Defendants with a further reprieve from their contractual obligations. Defendants should not be rewarded for their wait-and-see attitude in seeking arbitration with an even greater delay in having this simple matter resolved. *See In re Tyeo Intern. Ltd. Secs. Litig.,* 422 F.3d 41, 47 (1st Cir. 2005) ("arbitration is 'not meant to be another weapon in the arsenal for imposing delay and costs in the dispute resolution process'") (citations omitted).

Second, Winston & Strawn has already incurred the expense of litigation, including responding to Defendants' motion to dismiss and filing its summary judgment motion. *See* Dkts. 9, 10 and 13. The pending summary judgment motion is very straightforward and could be resolved quickly after Defendants respond. Thus, the case should proceed on that trajectory. *See Khan,* 521 F.3d at 428 (finding prejudice because the plaintiffs had to respond to a dispositive motion and "bear the expense of this proceeding").

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny Defendants' Motion to Stay and order Defendants to respond to its pending Motion for Summary Judgment.

Respectfully Submitted,

Thomas M. Buchanan # 337907
Charles B. Klein, # 450984
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D. C. 20006- 3817
(202) 282-5000
Counsel for Plaintiff
Dated: January 6, 2009

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN, LLP,

Plaintiff,

vs.

HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

Plaintiff Winston & Strawn LLP ("Plaintiff or "W&S"), by and through its undersigned counsel, hereby opposes the Motion to Dismiss the Complaint, or in the Alternative, for a More Definite Statement ("Motion to Dismiss"), filed by Defendants Harold E. Doley and Doley Securities, Inc. (together, "Defendants")'

INTRODUCTION

Plaintiff's Complaint alleges that the parties entered into an attorney-client relationship and Defendants owe W&S more than $85,000 for invoiced fees and expenses. In their Motion to Dismiss, Defendants argue that this claimed debt is

unenforceable as a matter of law because the engagement letter and corresponding invoices purportedly are "so indefinite that no contract was formed." Defs' Br. at 2. In essence, Defendants' theory of defense is that engagement letters used by nearly every law firm in the country and authorized by the D.C. Rules of Professional Responsibility do not create binding contracts with their clients. This argument should be rejected out of hand.

The engagement letter here - like most attorney-client engagement letters – stated the nature of the engagement, explained that fees would be billed within a range of hourly billing rates, and described the costs to be included in the charges. Doley, a sophisticated businessman, and his company had the opportunity to consult with independent counsel and, on their own volition and understanding of what the agreement entailed, signed the engagement letter agreement. After the contract was signed, W&S conducted, and billed for, legal services on Defendants' behalf. But Defendants have failed to pay for these services. This is a classic example of a breach of contract. Consequently, Defendants' Motion to Dismiss should be denied.

Defendants' request for a more definite statement is similarly without merit. Defendants are on fair notice of the basic claim against them and should be able to frame a responsive pleading.

BACKGROUND

As the Complaint describes, in the early spring of 2007, Defendants selected W&S to represent each of them in connection with an investigation by the Office of the Thrift Supervision ("OTS"). Compl. Par. 6. Before W&S's representation of Defendants began, two partners of W&S explained to Defendants the fees and costs that would be associated with W&S's representation of the Defendants - fees and costs to which Defendants agreed. *Id. paragraph 17.* Based on that oral agreement, and before any work was done on Defendants behalf, W&S sent to Defendants an engagement letter agreement. *Id. paragraph.* 8.

The parties' agreement discussed the terms of the attorney-client relationship and explicitly stated, among other things, that: (1) the nature of the engagement would concern W&S's representation of Defendants in the OTS investigation; (2) W&S's fees would be

determined on an hourly basis within an hourly rate range; (3) the firm's monthly bills would include allocable charges for costs and expenses incurred in performing the legal services; (4) the firm expected Defendants to pay these bills within 30 days of the

invoice; and (4) Defendants were to pay a $10,000 retainer to initiate the engagement. Id. paragraphs 8-10. Defendants were given the opportunity to consult with independent counsel regarding the engagement letter, a right they acknowledged, and Defendants signed the engagement letter on April 20, 2007. Id. paragraphs 11-12. W&S received the $10,000 retainer from Defendants on May 23, 2007. Id. paragraph 10.

After the parties signed the engagement letter, W&S performed legal work on behalf of Defendants based on the terms of the parties' agreement. *Id. paragraph* 13. The legal work included reviewing thousands of documents that were produced to the OTS; providing advice regarding certain purchases of stock; and preparing Doley for, and defending, his deposition. *Id.* W&S devoted a total of 215.25 hours, or billable work, to these matters. *Id.*

Defendants owe W&S $84,412.19 for these legal services, a debt that W&S communicated to Defendants through various invoices. *Id. paragraphs* 14-15. Defendants never objected to the quality or quantity of the work done by W&S on Defendants behalf, and never complained about the amount W&S charged for its legal services on behalf of Defendants. *Id. paragraph* 14. In fact, Doley promised on several occasions that payment was forthcoming. *Id.* But payment never came. *Id.* As a result, W&S seeks relief for breach of contract.

MOTION TO DISMISS STANDARD

Defendants recognize, as they must, that in reviewing a motion to dismiss, the Court must "accept[] all allegations in the Complaint as true, and construe[] the pleading in the light most favorable to the plaintiff" Defs' Br. at 2; *see also Warren v. D.C.*, 353 F.3d 36, 39 (D.C. Cir. 2004). Under this standard, Defendants' Motion to Dismiss must be denied unless "it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which

would entitle him to relief. All factual doubts must be resolved and all inferences made in favor of the plaintiff[]." *Tele-Communications of Key West v. United States*, 757 F.2d 1330, 1334-35 (D.C. Cir. 1985) (emphases and alteration in original) (citations omitted).

ARGUMENT

As demonstrated below, this Court should deny Defendants' Motion to Dismiss and their alternative Motion for a More Definite Statement.

I. The Motion To Dismiss Should Be Denied Because The Complaint States A Basic Breach of Contract Claim.

The sole issue raised in Defendants' Motion to Dismiss is whether the complaint satisfies the elements of a breach of contract claim. It clearly does. To state a breach of contract claim for failure to pay, a "complaint will be sufficient if it alleges that the defendant is under an obligation to pay the plaintiff a certain amount of money and interest, that he or she has refused to comply with the obligation, and that payment is due, for which judgment is requested."

WILLISTON ON CONTRACTS § 62:7 at 315 (2002).

Plaintiff's Complaint satisfies this low pleading threshold. First, it alleges that Defendants have an obligation to pay W&S for legal services rendered on their behalf. *See* Compl. paragraph 17 ("Defendants contracted with W&S when agreeing in writing to the terms of the engagement letter under which Defendants explicitly confirmed that they would be jointly and severably liable for the total fees and costs of W&S representing Defendants in the Lawsuit."), *id paragraph* 13 ("After the engagement letter was signed, W&S performed legal work on behalf of Defendants in the Lawsuit")' Second, the Complaint alleges that Defendants owe W&S a certain amount of money based on the contract. *See id. paragraph* 15 ("To date, Defendants owe W&S $84,412.19). Finally, the Complaint asserts that Defendants have failed to comply with their obligation, for which judgment is required. *See id.* par. 18 ("Defendants breached the terms of the

engagement letter when they failed to pay W&S fees and costs totaling $84,412.19")' These allegations - which, of course, must be accepted as true in this context - sufficiently allege a contractual obligation owed and breached by Defendants.

Defendants do not seriously contest that the Complaint pleads the elements of a breach of contract claim. Rather, they argue that the parties' engagement letter and corresponding invoices are too indefinite to be enforceable. This argument has no merit.

The engagement letter at issue here is precisely the type of written instrument encouraged by the American Bar Association and contemplated by the D.C. Rules of Professional Conduct to memorialize an enforceable attorney-client relationship and mutual obligations. *See* Stephen M. Terrell, *Rules of Engagement: Taking the Offense When It Comes to Defense,* ABA General Practice v.19 n.7, at 1 (Oct./Nov. 2002) ("'The engagement letter is the key to the attorney-client relationship. It is the contract that, along with the Rules of Professional Conduct, governs your relationship with your client.") (Ex. 1); D.C. Rules of Profl. Conduct 1. 5(b) ("When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time

after commencing the representation.").

The very purpose of the letter agreement signed by the parties here was to "reduce[] the possibility of misunderstanding." *See* D.C. Rules of Prof'l. Conduct 1.5(b) comment 2. By virtue of the parties' written agreement, there can be no "misunderstanding" that Defendants owe W&S for legal services rendered under the terms of the parties' agreement.

In fact, the law is clear that W&S's allegations give rise to a claim for breach of contract under the theory of account stated. An account stated arises where, as here, there is a

course of dealing between the parties, the creditor (here, W&S) has issued statements of account or invoices, and the debtor (here, Defendants) has failed to challenge the statements. *See Reed Research, Inc.* v. *Schumer Co.,* 243 F.2d 602,605 (D.C. Cir. 1957).

In *Riley v. Mattingly,* 42 App. D.C. 290 (D.C. Cir. 1914), the D.C. Circuit applied the account stated doctrine in the legal fee dispute context, affirming summary judgment in favor of the lawyer. The Court of Appeals explained that "[a]n account rendered [by a legal fee invoice], and not objected to within a reasonable time, is to be regarded as admitted by the party charged to be prima facie correct, and may not be impeached save for fraud,

error, or mistake." *Id.* at 294. It affirmed the grant of summary judgment in favor of the lawyer because "the account forming the basis of the action was held by the defendant for a period of eight months without being disputed in any way." *Id.* at 295. In so ruling, the D.C. Circuit rejected the defendant's defense "that plaintiffs' bill is too high" - finding that "[t]his averment raises no question of either accident or mistake." *Id., see also Brand v. Westall,* Civ Act. No. 94-0312, 1995 WL 235579 (Apr. 21, 1995 D.D.C. 1995) (granting summary judgment on behalf of lawyers in a fee dispute based on an account stated theory).

These cases are on point. The complaint makes clear that the parties here entered into an engagement letter agreement governing the attorney-client relationship, W&S performed legal services under that agreement, W&S then submitted invoices to Defendants for services rendered, and Defendants accepted those invoices without objection. Compl., paragraphs 8-15. In fact, Doley promised W&S on several occasions that payment was forthcoming. *Id. paragraph* 14. Thus, W&S has clearly made out a claim for breach of contract based on the theory of account stated. *See Riley,* 42 App. D.C. at 294-95; *Brand,* 1995 WL 235579, at *5.

II. Defendants' Motion For A More Definite Statement Should Be Denied As Well Because Defendants Have Full Notice of the Allegations Against Them.

Defendants cannot seriously argue that they do not understand the basic breach of contract claim against them. Consequently, there is no basis to require W&S to serve a more definite statement, as requested.

The Federal Rules of Civil Procedure require a plaintiff to set forth only a "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests. "" *Bell Atl. Corp.* v. *Twombly,* 550 U.S. ···, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley* v. *Gibson,* 355 U.S. 41, 47 (1957)); Fed. R Civ. P. 8(a). To be sure, "[t]he notice pleading rules are not meant to impose a great burden on a plaintiff." *Hoey* v. *D.C.,* Civ. Action No. 07-00919 (JDB), 2008 WL 839203, at *5 (D.D.C. Mar. 31, 2008).

Although courts technically can order a plaintiff to file a more definite statement, that procedure "is plainly designed to strike at unintelligibility rather than lack of detail." MOORE'S FEDERAL PRACTICE § 12.36[1] (2008). Indeed, "[c]ourts frown on a litigant's use

of the motion as a 'shotgun tactic' to substitute for discovery, or as a dilatory tactic to postpone filing an answer." *Id, accord Sultanate a/Oman* v. *H & S Computer Servs., Inc.,* Civ. Action No. 87-2688-0G, 1988 WL 47638, at *2 (D.D.C. Apr. 29, 1988) ("[A] motion for a more definite statement is reviewed with skepticism and will be granted only to cure an unintelligible claim").

As discussed above, Plaintiff's Complaint alleges a simple claim for breach of contract that is spelled out in detail. Defendants appear to Understand these charges. *See* Defs' Mot. at 1 ("The plaintiff suggests that a document signed on April 19, 2007 was a contract which

the defendants breached"). They do not argue that any of the allegations are unintelligible. Accordingly, there is no need for a more definite statement.

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny Defendants' Motion to Dismiss the Complaint, or in the Alternative, for a More Definite Statement.

Respectfully submitted,

____/S/ _____
Thomas M. Buchanan # 337907
Charles B. Klein, # 450984
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000
Counsel for Plaintiff
Dated: April 22, 2008

Case 1:08-cv-00144-RBW Document 9 Filed 04/22/08 Page 9 of 9

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NO.

WINSTON & STRAWN, LLP,
Plaintiff,

vs.

HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,

Defendants.

_____/

COMPLAINT

Plaintiff, Winston & Strawn, LLP ("W&S"), sues Defendants, Harold E. Doley ("Doley"), and Doley Securities, Inc. ("DSI") (collectively, "Defendants")'

Nature of the Case

This matter is a simple breach of contract case that cannot be more clear. Defendants agreed by written contract for W&S to represent them in a legal matter, and in exchange, to pay W&S for its legal services. The fees and costs of W&S's legal services were explained to Defendants both orally and in the written agreement. W&S performed legal services on

behalf of Defendants at the rates that were spelled out in the written agreement, and without any complaint from Defendants. As a result of the work performed by W&S on behalf of Defendants, Defendants owe W&S $84,412.19, which Defendants have not paid, and thus Defendants have breached a written contract with W&S.

Parties, Jurisdiction and Venue

1. W&S is, and at all relevant times, an Illinois limited liability partnership.

The work performed by W&S attorneys on behalf of Defendants was performed primarily in Washington, D.C.

2. Upon information and belief, Doley is, and at all relevant times was, a New York citizen who resides at 67 N. Broadway, Irvington, NY 10533, and is an officer, director, and shareholder of DSI.

3. Upon information and belief, DSI is, and at all relevant times was, a corporation incorporated in Delaware and having an office and principal place of business in New Orleans, Louisiana. DSI's present principal address is 616 Baronne Street, New Orleans, LA 70113.

4. This Court has subject matter

jurisdiction pursuant to 28 U.S.C. § 1332, as the matter in controversy exceeds, exclusive of interest and costs, the sum of $75,000 and is a civil action between citizens of different states.

5. Pursuant to 28 U.S.C. § 1391, venue lies in the District of Columbia, where a substantial part of the events or omissions giving rise to the claim occurred.

FACTUAL BACKGROUND

6. In the early spring of 2007, Defendants selected W&S to represent each of them in the investigation of Defendants being conducted by the Office of the Thrift Supervision (the "Lawsuit").

7. Before W&S's representation of Defendants began, partners of W&S, Thomas M. Buchanan ("Buchanan") and Michael A. Mancusi ("Mancusi") explained to Defendants the fees and costs that would be associated with W&S's representation of the Defendants. Defendants orally told Buchanan and Mancusi that they understood and accepted the fees and costs that would come with W&S's work on the Lawsuit.

8. On April 19, 2007, before W&S conducted any work on behalf of Defendants, Buchanan sent to Defendants an engagement letter. The engagement letter provided that W&S's "policy at the outset of an engagement with new clients is to outline not only the nature of the engagement, but also the basis on which the firm will provide legal services and bill for them." Engagement Letter at 1 (Ex. 1).

9. The engagement letter explicitly described that W&S's fees for work on the Lawsuit would be determined on an hourly basis and that there would be costs associated with W&S's representation of Defendants in addition to W&S's fees.

10. The engagement letter also described how and when W&S would bill Defendants, and when Defendants were expected to pay W&S. The engagement letter requested that Defendants pay a "$10,000 retainer to initiate the engagement" and explained that "[t]his retainer will be applied against ongoing fees and expenses." Engagement Letter at 4 paragraph 10 (Ex. 1). W&S received the $10,000 retainer on May 23, 2007.

11. Additionally, Defendants acknowledged in the engagement letter that they were given the opportunity to consult with independent counsel regarding the engagement letter.

12. On April 20, 2007, Doley signed the engagement letter for himself and Chad Robert signed the engagement letter on behalf of DSI. Robert is the President of DSI.

13. After the engagement letter was" signed, W&S performed legal work on behalf of Defendants in the Lawsuit The legal work included reviewing thousands of documents that were produced to the Office of the Thrift Supervision, providing advice regarding certain purchases of stock, preparing Doley for a deposition, and defending Doley's deposition. The legal work was performed by Buchanan and Mancusi, and a W&S associate. These W&S attorneys devoted 215.25 hours to this Case legal work.

14. Defendants never complained to W&S about the quality or quantity of work that W&S was performing. Nor did Defendants ever complain about the amount W&S charged for its legal services on behalf of Defendants. In fact, Defendant Doley promised on several occasions that payment was forthcoming. But payment never came.

15. W&S has applied the $10,000 retainer to amounts owed by Defendants to W&S. To date, Defendants owe W&8 $84,412.19.

COUNT I: BREACH OF CONTRACT

16. Plaintiff realleges and incorporates paragraphs 1-15 in this complaint.

17. Defendants contracted with W&S when agreeing in writing to the terms of the engagement letter under which Defendants explicitly confirmed that they would be jointly and severably liable for the total fees and costs of W&S representing Defendants in the Lawsuit. *See* Engagement Letter (Ex. 1).

18. Defendants breached the terms of the engagement letter when they failed to pay W&S fees and costs totaling $84,412.19.

19. W&S suffered damages as a result of Defendants' breach of contract.

WHEREFORE, W&S requests judgment against Defendants, jointly and severally, of $84,412.19 plus pre-judgment interest, costs and expenses, and such other and further damages and relief as this Court may deem proper.

Respectfully submitted,

Thomas Buchanan # 337907
Charles B. Klein #450984
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WINSTON & STRAWN LLP,
Plaintiff,
vs.
Case No: 1:08-cv-00144 (RBW)
HAROLD E. DOLEY
and DOLEY SECURITIES, INC.,
Defendants.

PLAINTIFF'S ERRATA STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUE FOR TRIAL AND BUCHANAN DECLARA TION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff Winston & Strawn LLP ("Winston & Strawn") has attached hereto a Corrected Statement of Facts as to Which There Exists No Genuine Issue for Trial ("Statement of Facts") and a Corrected Declaration of Thomas M. Buchanan ("Buchanan Declaration") in support of its motion for summary judgment, which was filed on April 24, 2008.

After reading Defendants' Supplemental Memorandum to the Defendant's Motion to Dismiss or for a More Definite Statement ("Supplemental Motion to Dismiss"), Plaintiff realized that it inadvertently stated that Chad Robert attended a meeting among Thomas

Buchanan and Michael Mancusi of Winston & Strawn, and Harold E. Doley, of Doley Securities, Inc. While Mr. Doley was there, Mr. Robert did not attend the meeting. Plaintiff's corrected Statement of Facts and corrected Buchanan Declaration fixes that mistake.

These corrected documents are not relevant to Defendants' motion to dismiss. Rather, they concern Plaintiffs' motion for summary judgment, to which Defendants have not yet responded.

Case 1 :08-cv-00144-RBW Document 12 Filed 05/06/08 Page 2 of 3,

Dated: May 6, 2008
Respectfully submitted,

_____/s/_____
Thomas Buchanan # 337907
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000

Case 1 :08-cv-00144-RBW Document 12 Filed 05/06/08 Page 3 of 3,

CERTIFICATE OF SERVICE

District of Columbia Bar Rules

Rule XIII. Arbitration.

(a) An attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the attorney were engaged, or if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representtation before a District of Columbia court or a District of Columbia government agency.

(b) The arbitration provided under this rule shall be final and binding on the parties according to applicable law, and shall be enforceable in the Superior Court and in any other court having jurisdiction. Unless the attorney and client agree otherwise, the arbitration shall be before the Attorney-Client Arbitration Board of the District of Columbia Bar, and shall be pursuant to such reasonable rules and regulations (including those relating to fees for arbitration services) as may be promulgated from time to time by the District of Columbia Bar and the Attorney-Client Arbitration Board.

The Attorney/Client Arbitration Board (ACAB)
Rules of Procedure

1. The Attorney/Client Arbitration Board (ACAB): The Attorney/Client Arbitration Board is usually referred to by its initials, as the "ACAB." The ACAB has 11 volunteer members: seven are lawyers and four are non-lawyers. These 11 members are selected by the District of Columbia Bar (the "D.C. Bar") and serve three-year terms; none serve more than two consecutive terms. The ACAB uses volunteer arbitrators, which it selects, and who serve two-year terms that may be renewed at the discretion of the ACAB. These arbitrators are lawyers and non-lawyers who have training and experience in arbitrating disputes. The ACAB uses either a single arbitrator ("sole arbitrator") or a three member panel, depending upon the amount of money in dispute. The ACAB Manager, who is a lawyer and employee of the D.C. Bar, handles the day-to-day business of the ACAB along with the Associate Program Specialist and the Senior Administrative Assistant, who are also employees of the D.C. Bar.

The ACAB handles two kinds of matters: disputes about legal fees, and disputes about legal malpractice. These rules of procedure cover only disputes about legal fees. There is a separate set of rules of procedure for disputes about legal malpractice.

8. Agreement to Arbitrate: After the petition is filed and after the petition has been opened by the ACAB:

(a) If the petition is filed by a client, the lawyer is deemed to have agreed to arbitrate and the arbitration will go forward unless the client withdraws the petition before the lawyer responds to the petition. The ACAB will send the lawyer a copy of the petition and a copy of these rules, and the arbitration process will begin. Petitions to arbitrate filed by the client may not be withdrawn by the client after the lawyer responds unless the lawyer and the client agree to do so in writing.

(b) If the petition is filed by a lawyer, the ACAB will send the client a copy of these rules and an Agreement to Arbitrate form.

(i) If the client signs the Agreement to Arbitrate and returns it to the ACAB, the arbitration process will begin. A signed Agreement to Arbitrate form is binding and cannot be withdrawn by the client unless both the lawyer and the client agree to do so in writing.

(ii) If the client refuses to sign the Agreement to Arbitrate, then the arbitration process will not begin. The arbitration service offered by the ACAB to clients is voluntary. If the client does not agree to arbitrate, the ACAB cannot compel the client to do so.

(iii) The ACAB will enforce an attorney/client agreement to arbitrate a fee dispute which is entered into prior to the dispute sought to be arbitrated if the pre-dispute agreement complies with D.C. Bar Legal Ethics Committee Opinion 218 (copy attached.) In this instance, the ACAB can compel a client to arbitrate a fee dispute filed by a lawyer. Petitions to

arbitrate filed by a lawyer may not be withdrawn by the lawyer after the client responds unless the lawyer and the client agree to do so in writing.

10. Informal Settlement: The ACAB encourages informal settlement of disputes prior to the arbitration hearing.

11. Voluntary mediation: The ACAB offers voluntary mediation as an option to parties in a pending fee dispute. Mediation is voluntary for both the client and the lawyer. Both parties must agree in writing to mediate before the ACAB will schedule a mediation session. Both parties will receive information about the voluntary mediation program after a fee dispute has been opened and docketed by the ACAB. If either party does not agree in writing to mediate, or if a settlement is not reached at a mediation session, the ACAB will continue processing the case for arbitration.

13. Assigning arbitrators: The ACAB will assign either one arbitrator or three arbitrators to decide the dispute. Arbitrators are selected from the ACAB's trained and experienced volunteers.

(a) If the combined amount of the claim and any counterclaim is less than or equal to $10,000, one arbitrator will be assigned to decide the dispute. The sole arbitrator may be either a lawyer or a non-lawyer.

(b) If the combined amount of the claim and any counterclaim is greater than $10,000, a panel of three arbitrators will be assigned to decide the dispute. The

panel will include at least one lawyer and at least one non-lawyer. A Chairperson will be designated by the ACAB. The lawyer and the client may agree to a panel including all lawyers or all non-lawyers or to have the dispute heard by a sole arbitrator.

(c) If requested by both the lawyer and the client, and if feasible, the ACAB will select an arbitrator with particular expertise in the practice area of the underlying dispute.

19. Hearing: The lawyer and the client are entitled to a hearing at which they may present evidence and cross-examine witnesses. The arbitrator(s) may schedule a preliminary hearing to resolve any threshold or dispositive issues (e.g., jurisdiction, statute of limitations).

(a) The sole arbitrator or the Chairperson will give any notices required in connection with the hearing, decide questions of procedure or scheduling, issue any necessary subpoenas permitted by law, preside at the hearing, administer oaths, rule on the admission and exclusion of evidence, and exercise any other powers of arbitrators pursuant to District of Columbia law. The requesting party shall be responsible for service of the subpoenas.

(b) There is no provision for formal discovery. The sole arbitrator or the Chairperson may, within his or her discretion, grant a request for discovery based or the relevancy and materiality of the request. Any request for discovery shall be submitted at least 30 calendar days prior to a scheduled hearing.

(c) Anyone involved in a hearing, as lawyer, client, or witness, is entitled to be represented by an attorney. It is the responsibility of anyone wishing to be represented by an attorney to make the necessary arrangements in advance as the hearing will not be delayed for someone who has failed to make the appropriate arrangements. Counsel for parties should enter their appearance in writing to the ACAB prior to a scheduled hearing.

(d) If both the lawyer and the client agree, the hearing may be waived and the arguments of each may be submitted in writing, together with any supporting documents, and the dispute may be decided on the basis of the written submissions. Even if the hearing is waived, the arbitrators may require oral testimony from any witness, and issue a notice to that effect to the lawyer and the client.

(e) The lawyer and the client are entitled to attend all hearings. Attendance at a scheduled hearing is a waiver of any deficiency in the notice of the hearing. Witnesses waiting to be heard may be excluded from the hearing until they testify.

(f) The burden of proof shall be on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence.

(g) The lawyer and the client are entitled to be heard at the hearing, either personally or through an attorney or other advisor or representative.

(i) Opening statements outlining the case may be presented at the hearing. The lawyer and the client

will be provided equal time in which to make such statements.

(ii) Evidence may be presented at the hearing by the testimony of witnesses and in documentary form. The lawyer and the client will be afforded full and equal opportunity for the presentation of any relevant evidence.

(iii) Questions may be asked by the lawyer and the client in cross-examination at the hearing of any witness who testifies.

(iv) Questions may be asked by the arbitrators(s) of any party or witness who testifies.

(v) Closing statements summarizing the case may be presented by the lawyer and the client at the hearing after all the evidence has been received.

(h) All relevant evidence will be considered, within the discretion of the arbitrator(s). Relevant evidence may include evidence relating to claims of alleged malpractice or alleged negligence, but only to the extent that those claims bear upon the fees, costs or related expenses to which the lawyer is entitled.

(i) Testimony will be given under oath.

(j) Hearings which cannot be completed on the first day will be continued, with due regard to the circumstances of those involved in the hearing and the desirability of a speedy determination. When al' necessary statements and evidence have been heard, the hearing will be closed.

(k) If either the lawyer or the client fails to appear at the hearing, the arbitrators may hear and decide the dispute upon the evidence produced and, notwithstanding any failure to appear, may enter a binding award. No decision may be based solely on the absence of the lawyer or the client.

(l) At any time before the award is signed, the hearing may be reopened by a sole arbitrator or a majority of a three-arbitrator panel, either at the request of the lawyer or the client with a showing of good reason, or for reasons determined by the arbitrators.

(m) Hearings are neither transcribed nor recorded by the ACAB. Requests by a party to have the ACAB transcribe or record the hearing will be denied. The parties are prohibited from transcribing or recording the hearing using their own or third-party resources (note-taking by hearing participants is not prohibited, however).

20. Standards: Arbitrators use the following standards in deciding fee disputes:

(a) Fee arrangements between lawyer and client should be clear and unambiguous. It is the responsibility of the lawyer to ensure this, and to explain to a new client, in writing, before or within a reasonable time after the lawyer has been employed, the scope of the lawyer's representation, what the fee will be, how the fee will be computed, what charges there may be in addition to the fee, and how and when the client will be expected to pay.

(b) Unless there are unique aspects of the fee arrangement, the lawyer may utilize a standardized letter, memorandum, or pamphlet explaining the lawyer's fee practices, and indicating those practices applicable to the specific representation. Such publications would, for example, explain applicable hourly billing rates, if billing on an hourly basis is contemplated, and indicate what charges (such as filing costs, transcript costs, duplicating costs, long distance telephone costs) are imposed in addition to hourly rate charges.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a criminal case where no contingent fee may be charged. A contingent fee agreement shall be in writing and shall state:

(i) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; and

(ii) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses should be deducted before or after the contingent fee is calculated.

(d) A lawyer may require advance payment of any fee but is obliged to return any unearned portion.

(e) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(f) When developments occur during the representation that renders an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

(g) The client is entitled to a written bill, which includes:

(i) In an arrangement based on hourly rates, a statement of how the time on which a lawyer's fee is based was spent.

(ii) In an arrangement based on contingent fees, a statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(iii) In an arrangement in which fees or costs are allocated among clients, a statement explaining to the client the basis for the allocation.

(h) A lawyer's fee shall be reasonable. Factors to be considered in determining the reasonableness of a fee include the following:

(i) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(ii) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(iii) The fee customarily charged in the District of Columbia for similar legal services;

(iv) The amount involved and the result obtained;

(v) The time limitations imposed by the client or by the circumstances;

(vi) The nature and length of the professional relationship with the client;

(vii) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(viii) Whether the fee is fixed or contingent.

(i) A lawyer's charges for disbursements, costs and expenses shall be reasonable. Factors to be considered in determining the reasonableness of charges other than fees include the following:

(i) A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office.

(ii) A lawyer may recoup expenses reasonably incurred in connection with the client's matter for support services provided by the lawyer or the law firm, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered.

(iii) A lawyer may not charge a client more than the actual disbursements for services provided by third parties like court reporters, travel agents, or expert witnesses.

(j) Other statutory and common law principles applicable in the District of Columbia to fee arrangements between lawyer and client may also be used by the arbitrators.

27. Other information: Copies of the sections of the District of Columbia Code that govern arbitration proceedings, the District of Columbia Rules of Professional Conduct and other information about the ACAB arbitration process are available at the D.C. Bar. The District of Columbia Rules of Professional Conduct and Legal Ethics Opinions may also be obtained from the D.C. Bar's Web site at www.dcbar.org/ethics.